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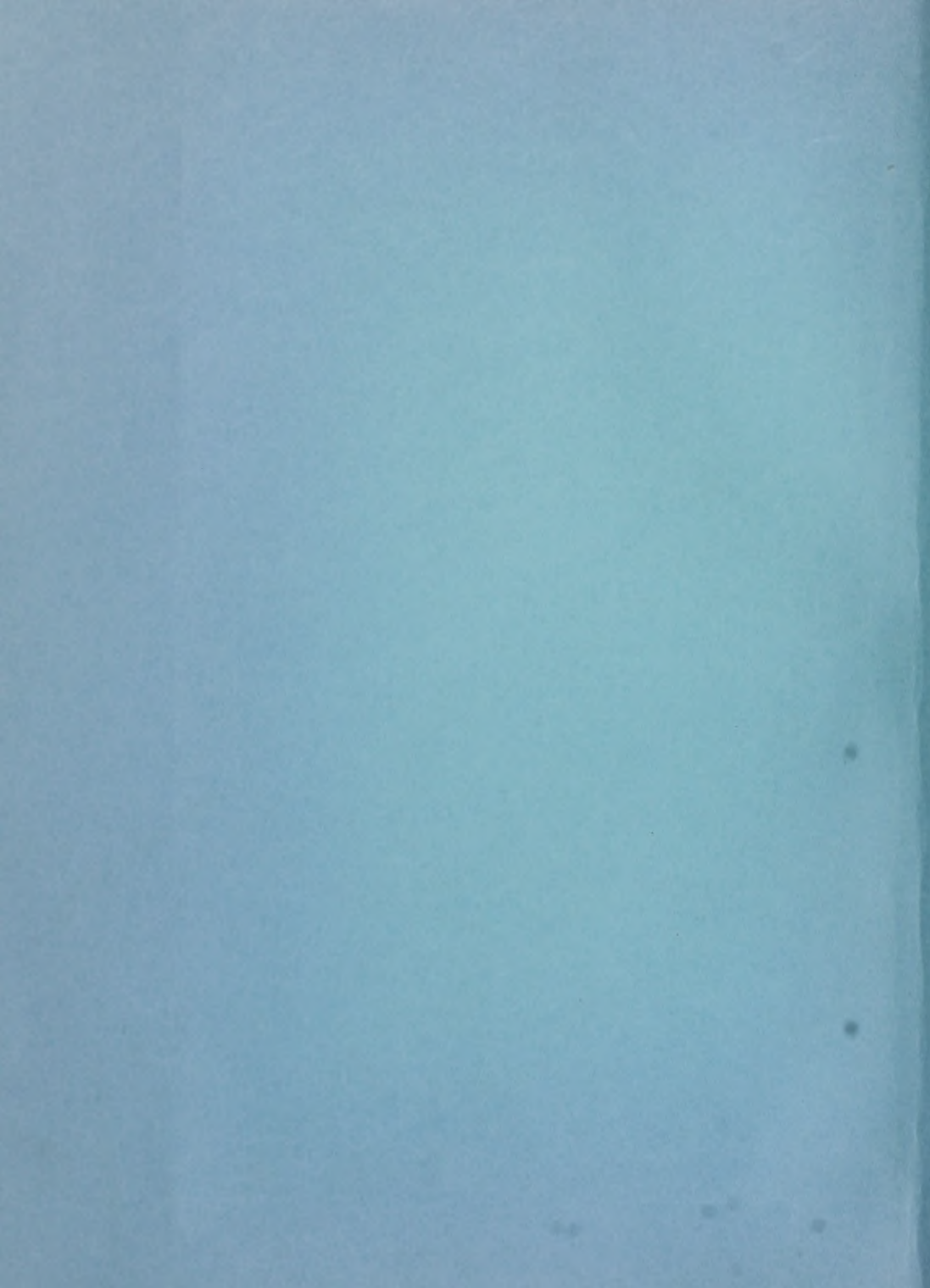
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No. 21,931

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL TELEPHONE COMPANY OF
CALIFORNIA, a corporation

Appellant,

vs.

COMMUNICATION WORKERS OF AMERICA,
an unincorporated association,

Appellee.

APPELLANT'S OPENING BRIEF

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FILED

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Appellee.

APPELLANT'S OPENING BRIEF

PRELIMINARY STATEMENT

This is an appeal by General Telephone Company of California (hereinafter referred to as "Company") from a judgment of the United States District Court for the Central District of California which ordered Company to arbitrate the issue of whether Robert L. Cherney, a salaried supervisor at the time of discharge, was discharged by Company for just cause.

Communications Workers of America (hereinafter referred to as "Union") initiated the action in the District Court by filing a petition against Company to compel arbitration pursuant to the Labor-Management Relations Act, 1947, 29 U.S.C. § 185. The District Court found that the dispute fell within the arbitration provisions of the collective bargaining agreement between Company and Union and ordered Company to submit to arbitration.

JURISDICTION

The jurisdiction of the District Court arose under the Labor-Management Relations Act, 1947, 29 U.S.C. § 185. Jurisdiction of this Court to review the judgment exists under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

1. Statement of Facts.

Union and Company entered into a written collective bargaining agreement (hereinafter referred to as "Agreement") which became effective March 15, 1964. (R. 6.)¹ In the Agreement, Company agreed to recognize Union as "the collective bargaining agent for all of its wage-earning employees during the life of" the Agreement. (R. 6, at p. 9.) "Wage-earning employees" is defined in the Agreement as follows:

"... all those persons on the payroll of the Company whose remuneration is expressed in the form of hourly wages." *Id.*

Robert L. Cherney was discharged by Company on February 4, 1965. At the time of his discharge, he was a salaried supervisor and not a wage-earning employee as defined above. He had been a supervisory employee at all times since August 31, 1964. (R. 27.) Cherney was discharged for alleged misconduct during a strike which ended March 15, 1964, and for disloyalty to the Company as a supervisor, in that he failed to advise Company that he was subpoenaed by Union to be its witness in an arbitration case involving the discharge of a wage-earning employee and failed to voluntarily advise Company of the

¹"R." refers to the Transcript of Record (June 20, 1967), consisting of 15 pleadings and documents paginated consecutively. "Tr." refers to the Reporter's Transcript of Proceedings in the District Court (May 16, 1966).

information he had concerning the aforementioned arbitration case. (R. 27, 28.)

Company refused to accept a Union grievance protesting Cherney's discharge on the ground that it was not obligated by the Agreement to entertain a grievance protesting or questioning the discharge of a supervisory employee. Company refused to submit to arbitration on the same ground. (R. 28.)

Thereafter, the Union initiated an action in the District Court to compel Company to arbitrate the question of whether Cherney was discharged for just cause.

At trial, Company contended that it could not be compelled to arbitrate the discharge of a salaried supervisor pursuant to the arbitration provisions of a collective bargaining agreement which expressly applies only to Company's wage-earning employees. Union agreed that Cherney was a salaried supervisor at the time of his discharge and conceded that he had not been promoted to the supervisory position as a sham or pretext to discharge him for conduct while a wage-earning employee. (Tr. 18.) Nevertheless, the Union argued that if arbitration of the discharge were not compelled, Company would have a license in the future to promote employees to supervisory positions in order to discharge them without their having recourse to arbitration.

The District Court found that Cherney was a supervisor at the time he was discharged. Nevertheless it further found that the dispute fell within the arbitration provisions of the Agreement and ordered Company to submit to arbitration.

2. Question Presented.

The question presented by this appeal is whether the District Court erred in compelling Company to arbitrate

the discharge of an employee who was a salaried supervisor at the time of his discharge pursuant to a collective bargaining agreement which applies solely to wage-earning employees.

ARGUMENT

I. COMPANY CANNOT BE COMPELLED TO ARBITRATE ANY DISPUTE WHICH IT HAS NOT AGREED TO ARBITRATE.

In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), the Supreme Court of the United States held that a duty to submit to arbitration can arise only from a contractual obligation to do so:

“For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”

See also, *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F.2d 181, 185-86 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963).

The Supreme Court has also held that it is the function of the courts to determine whether an employer has agreed to submit a particular dispute to arbitration:

“Under our decisions whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.” *Atkinson v. Sinclair Refining Co.*, *supra*, at 241.

“The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.”

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964).

See also, *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 754 (6th Cir. 1963), *cert. denied*, 376 U.S. 971 (1964); *Las Vegas Local Joint Executive Bd. of Culinary Workers v. Las Vegas Hacienda, Inc.*, 56 L.C. ¶ 12, 197 (9th Cir. 1967).

Union will doubtless argue that, since the "Trilogy" decisions,² federal courts are required to liberally construe collective bargaining agreements in such a way as to favor arbitration. Such an argument begs the question presented in this case, however, for if a reasonable interpretation of an agreement excludes a particular dispute from arbitration, the employer cannot be compelled to submit to arbitration. For example, in *Boeing Co. v. International Union, UAW*, 370 F.2d 969 (3d Cir. 1967), the union emphasized to the Court the federal policy favoring arbitration in its attempt to compel an employer to submit to arbitration. The Court acknowledged the policy, but held that it could not be relied upon to override established principles of contract interpretation:

"Despite this liberal rule of construction a reluctant party may not be compelled to submit a controversy to arbitration unless under a fair construction of the agreement he is bound to do so." *Id.* at 970.

Similarly, in *Retail Clerks International Ass'n. v. Lion Dry Goods, Inc.*, 341 F.2d 715, 720 (6th Cir.), *cert. denied*, 382, U.S. 839 (1965), the Court stated:

"A national policy favoring arbitration does not authorize arbitration unless the contract so provides."

²*United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

See generally, Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 Mich.L.Rev. 751, 759, 789-91 (1965).

Thus, unless under a fair construction of the collective bargaining agreement Company has agreed to arbitrate the discharge of Cherney, Union has no right to compel arbitration.

II. THE COLLECTIVE BARGAINING AGREEMENT DOES NOT OBLIGATE COMPANY TO ARBITRATE THE DISCHARGE OF AN EMPLOYEE WHO WAS NOT A WAGE-EARNING EMPLOYEE AT THE TIME OF HIS DISCHARGE.

A. It Is Clear That Neither The Collective Bargaining Agreement Between Company And Union Nor The Arbitration Provisions Contained Therein Apply To Salaried Supervisory Employees.

In this case, Union seeks to compel Company to arbitrate the question of whether an employee who was a salaried supervisor at the time of his discharge was discharged for "just cause." (R. 43, 44.) In order to determine whether the Company is obligated to arbitrate the discharge, it is necessary to examine the collective bargaining agreement entered into by Company and Union which sets forth the wages, hours, and working conditions of those employees of Company represented by Union.

The first provision of the Agreement, in which Company recognizes Union as collective bargaining agent, defines the scope and coverage of the Agreement:

"The terms and conditions of this Agreement shall apply to all wage-earning employees of the Company. . . ." (R. 6, at 9.)

That provision also defines “wage-earning employees” as “all those persons on the payroll of the Company whose remuneration is expressed in the form of hourly wages.” (Id.)³

Except for the recognition clause, Article VI (Definition), and one reference in Article VII,⁴ the phrase “wage-earning employees” does not appear in the Agreement. The remainder of the Agreement refers only to “employees.” For example, Article X (Discharges and Suspensions) provides that:

“Employees covered by this Agreement shall not be suspended or discharged except for just cause. . . .” (R. 6, at 19.)

Article XII (Grievance Procedure) states:

“The term ‘grievance’ as used in this Contract shall mean any grievance made either by an indi-

³The same definition of wage-earning employees appears in Article VI (Definitions):

“*Wage Earning Employees* — shall mean all persons on the Company’s payroll whose remuneration is expressed in the form of hourly wages.” (R. 6, at 14.)

⁴Article VII (Contracting of Work) limits the number of employees of independent contractors to 3% of the number of Company’s “wage-earning employees.” Provisions of the Agreement dealing with persons covered by the Agreement speak in terms of “employees.” Article VII, however, is not concerned with persons covered by the Agreement. It merely designates a class of persons, the number within which is multiplied by 3% to set the limit on the number of employees of independent contractors. Although the class of persons covered by the Agreement and the class multiplied by 3% happen to be the same, the difference in context requires that the class be precisely defined in the latter instance.

vidual employee or group of employees. . . ." (R. 6, at 21.)⁵

It is manifestly clear that the word "employees" refers to "wage-earning employees." Having defined the class of persons to which the Agreement is to apply in the recognition clause, there is no reason to define the class in detail every time it is referred to thereafter. "Employees" is merely a shorthand expression for "wage-earning employees." This construction of the Agreement is in accord with the familiar canon of construction:

"... general words in any contract relating to a particular subject shall be interpreted as meaning things of the same kind as the particular matters referred to." 4 Williston, *Contracts* § 619, at 746 (3d ed. 1961).⁶

The Agreement would make little sense unless "employees" is interpreted to mean only "wage-earning employees," since that is the class of persons on whose behalf Union was recognized as bargaining agent. The judgment of the District Court, if affirmed, would mean

⁵In its complaint, Union cited a number of clauses of the Agreement in support of its contention that the dispute over the discharge of Cherney involves questions of interpretation and application of the Agreement. (R. 3, 4.) Of the provisions cited, Articles II, V, X, XII, XIII, XVII, XVIII, XXII, XXVII, XXXII and Addendums One, Two and Three speak only of "employees." Article XIV refers to the phrase "salaried employees," but only in the context of employees who have been promoted and then, at some subsequent date, returned to the bargaining unit.

⁶A similar canon of construction is that, "The same words used in different clauses of a contract will be understood to have been used in the same sense." *Willingham v. Life & Casualty Ins. Co.*, 216 F.2d 226, 227 (5th Cir. 1954).

that the agreement which resulted from the bargaining would actually apply to a broader group of employees than those for whom Union bargained.⁷ Of course, at the time of bargaining, the expectation of the parties was that only persons in the bargaining unit would be affected by the Agreement. Nothing in the Agreement or otherwise presented to the Court below suggests that the slightest consideration was given to any other class of persons.

The general scheme of the Agreement between Company and Union clearly indicates that the parties contemplated all provisions of the Agreement, including the arbitration provisions, to apply only to wage-earning employees.⁸ In a wide variety of cases, the courts have refused to compel arbitration where the general scheme of the collective bargaining agreement in question suggested that the dispute was not intended to be arbitrable. See, e.g., *Boeing Co. v. International Union, UAW*, 370 F.2d 969 (3d Cir. 1967); *Local 998, UAW v. B. & T. Metals Co.*, 315 F.2d 432 (6th Cir. 1963).

⁷That the arbitration provisions of the Agreement should apply to supervisory personnel is particularly objectionable because it would in effect allow Union to represent a class of persons which is excluded from coverage by the Labor-Management Relations Act, 1947, § 2(3), 29 U.S.C. § 152(3):

“The term ‘employee’ . . . shall not include . . . any individual employed as a supervisor. . . .”

⁸Indeed, many provisions of the Agreement could not possibly apply to any class of persons other than wage-earning employees. For example, Article XVI (Temporary Assignments) deals with assignments to higher wage-paying classifications (R. 6, at 26); Article XVII (Credited Service) refers to the effective date of wage increases (R. 6, 27); Article XIX (Overtime Hours) computes overtime pay at the rate of one and one-half times the normal hourly rate of pay (R. 6, at 30). None of these provisions could have any application to salaried employees. Moreover, no provision of the Agreement deals with the many problems which would be unique to the salaried supervisor.

B. Cherney Was A Salaried Supervisory Employee At The Time Of His Discharge, And, Therefore, The Grievance Arose At A Time When The Collective Bargaining Agreement No Longer Applied.

There is no question that Cherney was a salaried supervisor of the Company at the time of his discharge. Paragraph G of the Pretrial Conference Order agreed to by Company and Union reads as follows:

“G. On February 4, 1965, Robert L. Cherney was dismissed from the employ of the Company. On February 4, 1965, Cherney was a supervisory employee, and not a wage-earning employee of the Company. Cherney had been a supervisory employee, and not a wage-earning employee, at all times after August 31, 1964.” (R. 27.)

The Union may try to bring the discharge of Cherney within the scope of the Agreement by arguing that, if Company is upheld in its position, Company will be able in the future to avoid arbitration by elevating to supervisory positions those “wage-earning employees” whom it wishes to discharge. This argument would involve the implicit suggestion that Cherney may have been promoted by the Company in bad faith in order to discharge him without being required to submit to arbitration. There are no facts present in this case to support an argument that the promotion of Cherney was for such purpose. In fact, in oral argument before the District Court, the Union admitted that it was *not* contending that the Company acted in bad faith with respect to the promotion:

“First of all, the Union is coming in here representing an employee who at the time of his discharge was a managerial employee. We are not making and

never have made any contention, your Honor, that this was a sham promotion to get to Mr. Cherney. My goodness, we do not make any such contention.” (Tr. 18.)

Even assuming *arguendo* that the promotion of Cherney was a sham or pretext to discharge him for alleged conduct during the time he was a wage-earning employee, there would still be no arbitrable issue. The Agreement applies solely to wage-earning employees. During the next collective bargaining negotiations, the Union can appropriately argue that there should be a provision for arbitrating discharges of salaried supervisors who were allegedly promoted in bad faith. But the Union should not be permitted to obtain through the arbitration process some concession or advantage that it did not win at the bargaining table.

“The union also argues that if the company is not compelled to arbitrate this grievance it will be able to exercise almost unlimited discretion over the operation of matters arising under an entire section of the agreement. This argument does not impress. We cannot bring ourselves to accept this invitation to ignore the plain meaning of the Section 9.08 exclusionary clause, and to find ambiguity where none exists. . . . If, at the bargaining table, the union’s true intent was to reserve a different sort of Section 9.08 question for an arbitrator, it should not have consented to the incorporation into that section of an exclusionary clause so broad and sweeping.” *Communications Workers of America v. New York Telephone Co.*, 327 F.2d 94, 97 (2d Cir. 1964).

See also, *Black-Clawson Co. v. International Ass’n. of Mach.*, 313 F.2d 179, 186 (2d Cir. 1962).

C. Company Is Not Required To Arbitrate The Discharge Of A Salaried Supervisor Even If The Discharge Was Based Upon Acts Committed While The Employee Was A Wage-Earning Employee.

The critical issue in this case, in the words of the Union, is "the right of the Company to discharge a supervisory employee for *alleged* acts committed by said supervisory employee while a wage-earning employee of the Company and represented by the Union." (R. 44.)⁹ The District Court may have been influenced by this contention and compelled arbitration based on an erroneous conclusion that there was a factual issue for the arbitrator to decide, *viz.*, whether Cherney actually committed certain acts during the time he was a wage-earning employee. That is not the issue, however. The sole issue is whether Cherney, *at the time of his discharge*, had recourse to the grievance and arbitration provisions of the Agreement. Company submits that he did not and that the District Court erred in interpreting the Agreement to find any duty on Company's part to arbitrate whether or not Cherney was discharged for just cause. The Agreement provides that "Employees *covered by this Agreement* shall not be suspended or discharged except for just cause. . . ." (R. 6, at 19) It does not provide that "employees who were at one time covered by this Agreement shall not be . . . discharged except for just cause. . . ." Cherney had no alleged grievance concerning the justification for his discharge *until he was discharged*, and at that time he was no longer covered by the Agreement.

⁹It should be noted that only one of the reasons given for Cherney's discharge related to acts committed while a wage-earning employee. His discharge was also based on disloyalty to the Company *during the time he was a supervisory employee*. (R. 27, 28.)

In several recent cases, it has been clearly established that, in determining the applicability of a contract under circumstances similar to those in the present case, it is the status of the employee *at the time the alleged grievance arises* which is of crucial importance. In *Boeing Co. v. International Ass'n. of Mach. & Aero Wkrs.*, 381 F.2d 119 (5th Cir. 1967), four employees were discharged for acts occurring *prior* to the effective date of the collective bargaining agreement. The employer argued that it had agreed to arbitrate only disputes arising under the contract, not disputes arising out of acts occurring prior to the contract. The Court held, however, that the only relevant time for judging the applicability of the contract to the discharged employee was *the time the grievance arose*. The grievance arose with the discharge of the employee, which occurred while the contract was in effect. It was immaterial that the acts which led to the discharge occurred prior to the contract:

“ . . . One thing is crystal clear under the new contract. If — and the if is really the heart of the question — the grievance is the suspension and discharge subsequent to the effective date of the new contract, not the Employer's reasons therefor based upon the conduct of September 16, the new contract explicitly calls for grievance machinery and arbitration of layoffs and discharges.” *Id.* at 121.

See also, *International Bhd. of Elec. Wrkrs. v. Wadsworth Electric Mfg. Co.*, 240 F.Supp. 292, 293 (E.D.Ky. 1965).

The same principles apply in the instant case. The *Boeing* court emphasized “the neutral character of these principles so that it is sauce for both employer and union alike. . . .” (*Id.* at 123.) The important time in determining whether the contract applies to Cherney is the time at which the grievance arose. And there is no ques-

tion that in the instant case the grievance did not arise until the discharge occurred:

“ . . . The grievance was action of the Employer in terminating the contractual right to present and future employment. It was these actions by the Employer after the new contract became effective that for the first time had any adverse effect upon the four employees.” *Id.* at 122.

Thus, the status of Cherney at the time when the acts leading up to the discharge took place is totally irrelevant. The contract applies to Cherney if, and only if, he was a wage-earning employee at the time of the discharge. There is no question that at that time Cherney was a salaried supervisor.

III. THE TERMINATION OF STRIKE AND RETURN TO WORK AGREEMENT DOES NOT OBLIGATE COMPANY TO ARBITRATE THE DISCHARGE OF CHERNEY.

Union may argue that an obligation to arbitrate the discharge of Cherney can be found in the Termination of Strike and Return to Work Agreement, which was submitted to the Court below (R. 17). That argument is plainly without support. The agreement reads, in relevant part:

“The Company will reinstate striking employees except those who *have been* discharged for cause. The Company will agree to arbitrations with the Union to determine the validity of each discharge for cause, provided the Union requests each such arbitration.” (Paragraph 1.)

“ . . . The term of this back-to-work Agreement and all provisions covered herein will be six (6) months from the date of the Primary Agreement,

unless specifically designated otherwise within the particular provision covered within this Agreement.” (Paragraph 11.)

Thus, the arbitration clause of the Termination of Strike and Return to Work Agreement applied only to employees who had been discharged *during* the strike. The strike ended March 15, 1964, but Cherney was not discharged until February 4, 1965 (R. 27). He was clearly not discharged during the strike.

Moreover, even if the coverage of the agreement were less restricted, the fact that it terminated by its own terms on September 15, 1964, six months after the effective date of the collective bargaining agreement (March 15, 1964) precludes any possibility that it could be relied upon as a basis for compelling arbitration of the February 4, 1965, discharge of Cherney.

CONCLUSION

It is the role of this Court to review decisions of law made by the District Courts. See, *e.g.*, *Republic Pictures v. Rogers*, 213 F.2d 662 (9th Cir.), *cert. denied*, 348 U.S. 858 (1954); *Brown v. Cowden Livestock Co.*, 187 F.2d 1015 (9th Cir. 1951). The issue of law involved in the present case is whether the Company has agreed to arbitrate the discharge of an employee who was a salaried supervisor at the time of his discharge.

It is well settled that the question of whether an issue is arbitrable under a collective bargaining agreement is a matter of law for the courts to decide, rather than a matter of fact to be left to the arbitrator. See, *e.g.*, *Local 998, UAW v. B. & T. Metals Co.*, 315 F.2d 432, 436 (6th Cir. 1963).

The District Court ordered defendant to arbitrate the discharge of a salaried employee in spite of the fact that

the collective bargaining agreement upon which arbitration is based applies only to wage-earning employees. This order is either based upon an incorrect interpretation of the collective bargaining agreement or ignores the collective bargaining agreement and is contrary to the established principle that a duty to arbitrate any dispute can arise solely from a contractual obligation to arbitrate that dispute. The decision is erroneous and should be reversed with costs on appeal to defendant.

Respectfully submitted,

O'MELVENY & MYERS

CHARLES G. BAKALY, JR.

RICHARD C. WHITE

Attorneys for Appellant

General Telephone Company of
California

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD C. WHITE

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Appellee.

On Appeal from the Judgment of the
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Central District of California

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

The statement in appellant's brief concerning the jurisdiction of the United States District Court to hear this cause and the jurisdiction of this court to review the District Court's decision is accurate and is adopted by appellee.

STATEMENT OF THE CASE

All of the facts in this case were agreed upon and are set forth in the Pre-Trial Conference Order

signed by United States District Judge Albert Lee Stephens, Jr., on March 7, 1966 (R. 25-39, Vol. 1).

A strike against the appellant company commenced October 19, 1963. On March 7, 1964, the appellant and appellee executed a Termination of Strike and Return to Work Agreement (Plaintiff's Exhibit 2, Vol. 2) and the strike ended March 15, 1964. Appellant and appellee entered into a written collective bargaining agreement effective March 15, 1964 with respect to rates of pay, wages, hours of employment and other duties of employment of all wage-earning employees of the appellant (R. 6, Vol. 1, Plaintiff's Exhibit 1, Vol. 2).

The Return to Work Agreement dated March 7, 1964 provided, in part, that the appellant would reinstate all striking employees except those who were discharged for misconduct during the strike. The validity of any such discharges was subject to arbitration. The term of the Return to Work Agreement was from March 15, 1964 to September 15, 1964.

When the strike ended on March 15, 1964, striking employee Robert L. Cherney was reinstated by appellant and he remained a wage-earning employee of the appellant company until September 1, 1964 when he was promoted to management (R. 27, Vol. 1).

On February 4, 1965, Robert L. Cherney was dismissed from the employ of the appellant company. The appellant's reasons given for the dismissal were that (1) *Cherney had engaged in misconduct during the strike* against appellant which commenced Octo-

ber 19, 1963 and ended March 15, 1964; (2) for disloyalty to the appellant as a supervisor on and after September 1, 1964, for failure to advise appellant that he was subpoenaed by appellee to be its witness in an arbitration case involving the discharge of a wage-earning employee of appellant for alleged misconduct during said strike, and (3) for failure to voluntarily advise appellant of the information he had concerning the above-described arbitration case (R. 27, 28, Vol. 1).

Appellee thereupon presented to appellant a grievance protesting the discharge of Cherney and on or about February 10, 1965 appellant advised appellee that it could not accept the grievance inasmuch as the grievance procedure provisions of Article XII of the Agreement did not apply to the discharge of a supervisory employee. Appellant refused to submit the grievance to arbitration on the same ground (R. 28, Vol. 1).

Appellee thereupon initiated this action in the District Court seeking an order that the grievance concerning the dismissal of employee Robert L. Cherney is a dispute which involves the interpretation and application of the collective bargaining agreement and is within the arbitration article of the collective bargaining agreement.

Article X (Discharges and Suspensions) of the collective bargaining agreement effective March 15, 1964 (R. 6, Vol. 1) provides as follows:

“1. Employees covered by this agreement shall not be suspended or discharged except for just cause”

Article XII (Grievance Procedure), Section 1 of said Agreement provides as follows:

“1. The term ‘grievance’ as used in this contract shall mean any grievance made either by an individual employee or group of employees contending that he or they are being prejudiced as a result of misinterpretation or misapplication of any of the terms of this contract or wage schedules from time to time in effect. The above definition shall be grievances subject to arbitration.”

Article XIII (Arbitration) of said Agreement provides as follows:

“1. In the event any grievance arising hereunder cannot be resolved through negotiations between the parties hereto under the procedures hereinabove set forth, the matter shall be submitted to arbitration upon written request of the Union to the Company, and in accordance with the following procedures.”

Appellee asserted in its Petition For An Order Directing Adjustment of A Dispute Under A Collective Bargaining Agreement (R. 2-7, Vol. 1) that the dismissal of employee Cherney involves a dispute as to the meaning, application and interpretation of the terms of the collective bargaining agreement, including the Recognition provisions, Article II (Non-Discrimination Clause), Article X (Discharges and Suspensions), Article XII (Grievance Procedure), Article XIII (Arbitration), Article XIV (Seniority), Article XVII (Credited Service), Article XVIII (Regular Hours), Article XXII (Vacations), Article

XXVIII (Wages), Article XXXII (Sickness and Accident Benefits), and the Group Life Insurance, Basic Hospital-Medical-Surgical Plan, Major Medical Expense, and Pension Plan provisions of the Agreement.

At the trial, the court received into evidence exhibit numbers 1 (collective bargaining agreement effective March 15, 1964), 2 (Termination of Strike and Return to Work Agreement), and 3 (Letter dated April 10, 1950, from Company District Manager Carl Von Hake to Communications of America Division No. 7 President W. A. Baker) offered by appellee bearing on the issue of the arbitrability of the dispute in question.

Following the trial, the court made its Findings of Fact and Conclusions of Law (R. 67-71, Vol. 1) and entered its Judgment (R. 72 and 73, Vol. 1) holding that the dispute concerning the discharge of employee Robert L. Cherney is within the arbitration article of the collective bargaining agreement entered into between the parties and effective March 15, 1964. Appellant's Motion to Amend Findings was denied (R. 74-86) and this appeal followed.

SUMMARY OF ARGUMENT

I. The grievance concerning the dismissal of employee Robert L. Cherney involves a dispute as to the meaning, application and interpretation of the collective bargaining agreement and is within the arbitration article of the collective bargaining agreement.

II. The Union itself has a grievance herein concerning a dispute as to the meaning, application and interpretation of the collective bargaining agreement.

ARGUMENT

I

THE GRIEVANCE CONCERNING THE DISMISSAL OF EMPLOYEE ROBERT L. CHERNEY INVOLVES A DISPUTE AS TO THE MEANING, APPLICATION AND INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT.

Employee Robert L. Cherney was admittedly discharged by the appellant company for engaging in misconduct during the strike against the Company which commenced October 19, 1963 and ended March 15, 1964. At the time of said alleged misconduct, Cherney was a wage-earning employee of the Company. The two additional grounds for discharge advanced by the Company likewise are related to strike misconduct actions which include Mr. Cherney and another wage-earning employee.

It is undisputed that if Cherney had been discharged by the Company during the course of the 150-day strike for said alleged strike misconduct, his discharge would have been subject to arbitration pursuant to Paragraph 1 of the Termination of Strike and Return to Work Agreement. Likewise, if Cherney had been discharged by the Company for any reason whatsoever following his reinstatement at the end of the strike, his discharge would clearly have been subject to arbitration pursuant to Article X of

the collective bargaining agreement while a wage-earning employee of the Company and represented by the Union. Effective September 1, 1964 Cherney was promoted to management. On February 4, 1965 he was dismissed from the employ of the Company for the above-mentioned reasons. The basic contention of the Company is that the contractual grievance and arbitration provisions of the collective bargaining agreement do not apply to this dispute because the dispute involves an employee who has been part of Management and is therefore outside the bargaining unit.

The Company and the Union totally disagree as to the meaning and interpretation of important sections of the contract. However, there is no assertion here that a supervisory employee is within the bargaining unit while he is acting as such. There is no dispute about the fact that from September 1, 1964 to February 4, 1965 Cherney was a part of Management. And there can be no dispute that from February 4, 1965 forward Cherney no longer was a part of Management. The question is: *while Cherney was within the bargaining unit (at all times prior to September 1, 1964) did he acquire legal rights under the Return to Work Agreement signed on March 7, 1964 and under the collective bargaining agreement effective March 15, 1964 which—after he is no longer a part of Management—he may now assert?*

Appellee Union contended in its Petition and at the trial that the dismissal of employee Cherney involves a dispute as to the meaning, application and interpre-

tation of various provisions of the collective bargaining agreement. A clear example of this involves the seniority provisions of the Agreement (Article XIV) which provides that, "All service by a *salaried* employee during the time that he is on salary shall be counted in determining his seniority under any of the provisions of this Article XIV in the event such employee is returned to an hourly wage" (emphasis supplied). The Company argues that it can put a man in a supervisory position and then a short time later, for any or no reason, discharge him. If this were true, it would penalize the Company's ability to secure competent supervisory employees from within its own organization, of which the Company publicly boasts that it does. Likewise, it would plainly violate the seniority rights acquired by the employee when he was a bargaining unit employee and a beneficiary of the rights bargained for in the collective bargaining agreement.

If seniority rights of bargaining unit employees who are promoted to supervisory positions are retained, and an arbitrator can so find under the language of the instant agreement *and* under the past practices of the Company (please see Union Exhibit 3), then they are vested rights. Such seniority rights can only be divested if done in accordance with the collective bargaining agreement.

It is submitted that a forfeiture of vested seniority rights must be clearly expressed and that there is no language in the instant Agreement indicating that seniority rights are forfeited if an employee is termi-

nated as a supervisor. Said dispute clearly involves an interpretation of the seniority, discharge, grievance, arbitration and other provisions of the contract. It is unreasonable to suppose that retained seniority rights have any value if they depend solely upon the convenience or desire of the employer. This is especially true in the instant case where the reasons for the discharge involved strike misconduct of wage-earning employees. By the appellant company's contention it could very well promote an employee one day and discharge him as a supervisory employee the next and thus completely by-pass the grievance and arbitration process and take away the employee's vested rights, including his seniority rights, in the bargaining unit. Were the employer's contention sustained, the practical consequence might well be that no bargaining unit employee would accept a promotion to a supervisory position.

Brief mention should be made of the several cases which the appellant refers to in its brief. The isolated language referred to by appellant cannot be successfully relied upon. Said cases clearly apply the principles governing labor arbitration agreements which have been delineated in the trilogy of the *Steelworker* cases decided in 1960. The underlying rationale of those holdings rests upon the federal policy to promote industrial peace through collective bargaining agreements and the recognition that a major factor in achieving that objective is the grievance and arbitration machinery established by the parties to resolve disputes. And when the parties have entered

into a comprehensive arbitration provision, as in the instant case, any challenge that a grievance is not intended to be covered must find support in unmistakably clear language of exclusion; arbitration of a particular dispute is to be ordered unless it may be said with positive assurance that it is excluded by the contract. The evidence in this case does not meet that test.

The *Boeing* case which appellant refers to is not in point since the discharge therein did *not* concern an employee who had been promoted to Management following his reinstatement after the strike. The employees involved therein were not even reinstated following said strike, as was employee Cherney in the instant case. Likewise, the Machinists did not negotiate a Return to Work Agreement as did CWA in the instant case. Furthermore, under the facts of this case, a disciplinary discharge of a striking employee was clearly subject to arbitration whether said discharge for misconduct occurred during *or* after the strike.

Appellee respectfully submits that under the facts of this case the grievance concerning the dismissal of employee Robert L. Cherney involves a dispute as to the meaning, application and interpretation of the collective bargaining agreement, of the Return to Work Agreement, and of existing past practices.

II

**THE UNION ITSELF HAS A GRIEVANCE HEREIN CONCERNING
A DISPUTE AS TO THE MEANING, APPLICATION AND
INTERPRETATION OF THE COLLECTIVE BARGAINING
AGREEMENT.**

Section 1 of Article XII (Grievance Procedure) of the collective bargaining agreement provides as follows: "The term 'grievance' as used in the contract shall mean any grievance made either by an individual employee *or group of employees* contending that he or they are being prejudiced as a result of misinterpretation or application of any of the terms of this contract or wage schedules from time to time in effect. The above definition shall be subject to arbitration" (emphasis supplied).

While the phrase "group of employees" may identify a small number of employees, in one job classification, for example, an arbitrator can find that it may also refer to the whole bargaining unit, that is to say, the Union. Thus this language anticipates that the Union may file a grievance, as in the instant case, and that an arbitrator can find that there has been an improper application of the Agreement, as the Union understands its terms, to a given employee (Robert L. Cherney) and/or to the whole bargaining unit.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
December 27, 1967.

Respectfully submitted,
DUANE W. ANDERSON,
Attorney for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

DUANE W. ANDERSON,
Attorney for Appellee.

No. 21,931

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL TELEPHONE COMPANY OF
CALIFORNIA, a corporation

Appellant,

vs.

COMMUNICATIONS WORKERS OF AMERICA,
an unincorporated association,

Appellee.

APPELLANT'S REPLY BRIEF

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FEB 5 1968

WM. B. LUCK CLERK

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APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

On or about November 30, 1967, General Telephone Company of California (hereinafter "Company") served and filed its Appellant's Opening Brief. Thereafter on or about January 2, 1968, Communications Workers of America (hereinafter "Union") filed its Brief For The Appellee.

Company was granted until February 5, 1968, to file its Appellant's Reply Brief.

ARGUMENT

I. THE QUESTION ON APPEAL IS NOT WHETHER COMPANY AGREED TO ARBITRATE ANY ISSUE ASSOCIATED WITH NON-BARGAINING UNIT EMPLOYEES, BUT RATHER IS WHETHER THE LOWER COURT ERRED IN FINDING THAT COMPANY AGREED TO ARBITRATE THE ISSUE OF WHETHER IT HAD JUST CAUSE TO DISCHARGE A SALARIED SUPERVISOR.

In its Brief for the Appellee, Union has erroneously attempted to broaden the question for review. The question which Union would now have this Court consider is whether the collective bargaining agreement (R. 6) between Company and Union can be construed so as to show *some* arbitrable issue associated with non-bargaining unit personnel, even though such issue was not the subject of dispute between the parties. For support, the Union cites Article XIV of the collective bargaining agreement which provides that "All service by a *salaried* employee during the time that he is on salary shall be counted in determining his seniority under any of the provisions of this Article XIV *in the event such employee is returned to an hourly wage.*" (Emphasis added.)

Although the foregoing provision refers to a "salaried employee", such as Cherney was in the instant case, it has no application or relevancy to the grievance which Company was ordered to arbitrate. The foregoing would only be relevant, *if* Company was resisting arbitration over a grievance associated with seniority such as the amount, if any, of seniority applicable to a salaried employee who returned to the bargaining unit.

But that is *not* the situation herein.

This action had its origin in Company's refusal to entertain a grievance or to arbitrate whether it had just

cause to discharge Cherney, a salaried supervisor. Union petitioned the lower court to compel Company to arbitrate such grievance. In its judgment and order, the lower court ordered Company to submit to arbitration and defined the issues to be determined by the arbitrator as follows:

“1. Was Robert L. Cherney discharged by the Company without just cause?

“2. If so, what is the remedy?” (R. 73.)

While conceivably Article XIV might have some relevance to issue No. 2, an arbitrator would never get to the issue of “remedy” if Company was *not* contractually obligated to arbitrate issue No. 1.

As stated in detail in Company’s Opening Brief, it is clear that the question before this Court is restricted to determining whether the lower court erred in finding that Company had contractually agreed to arbitrate whether it had just cause to discharge an employee who was a salaried supervisor at the time of his discharge. The judgment and order, by their terms, do not support Union’s attempt to raise unrelated issues of arbitrability.

II. EVEN IF AN ARBITRATOR SHOULD FIND THAT COMPANY DID NOT HAVE JUST CAUSE TO DISCHARGE CHERNEY FOR HIS MISCONDUCT AS A WAGE-EARNING EMPLOYEE, HIS DISCHARGE FOR MISCONDUCT AS A SUPERVISOR WOULD STILL HAVE TO STAND.

Cherney was discharged for three reasons, only *one* of which related to his conduct as a wage-earning employee. These reasons were as follows:

1. “. . . Cherney had engaged in misconduct during a strike against the (Company) which commenced October 19, 1963, and ended March 15, 1964;”

2. “. . . for disloyalty to the (Company) *as a supervisor* on and after September 1, 1964, for failure to advise the (Company) that he was subpoenaed by the (Union) to be its witness in an arbitration case involving the discharge of a wage-earning employee of the (Company) for alleged misconduct during the above-described strike;”

3. “. . . for disloyalty to the (Company) *as a supervisor* on and after September 1, 1964 . . . for failure to voluntarily advise the (Company) of the information that he had concerning the above-described arbitration case.” (R. 68-69.)

In its Brief, Union characterizes the latter two reasons in the following manner:

“The two additional grounds for discharge advanced by the Company likewise are related to strike misconduct actions which include Mr. Cherney and another wage-earning employee.” (Appellee’s Brief, p. 6.)

Such characterization is not accurate for it is clear from reading the latter two reasons that they were *not* based on Cherney’s strike misconduct as was the case with *only* the first reason. The latter two reasons were based on Cherney’s performance *as a supervisor*.

Assuming *arguendo* that Company is contractually obligated to arbitrate whether or not it had just cause to discharge Cherney for the first reason, the alleged misconduct which occurred while he was a wage-earning employee and while he was covered by either the collective bargaining agreement or the Termination of Strike and Return To Work Agreement, Company still could not be compelled to arbitrate whether it had just cause to discharge Cherney for his misconduct *as a supervisor*.

Even Union admits that:

“... there is no assertion here that a supervisory employee is within the bargaining unit while he is acting as such. There is no dispute about the fact that from September 1, 1964 to February 4, 1965 Cherney was a part of Management. . . .” (Appellee’s Brief, p. 7.)

However, Union then goes on to declare the following novel proposition based on Article XIV, *supra*:

“If seniority rights of bargaining unit employees who are promoted to supervisory positions are retained, and an arbitrator can so find under the language of the instant agreement *and* [Union’s emphasis] under the past practices of the Company (please see Union Exhibit 3), then they are vested rights. *Such seniority rights can only be divested if done in accordance with the collective bargaining agreement.*” (Appellee’s Brief, p. 8) (Emphasis added.)

Union does not define what it means by “in accordance with the collective bargaining agreement”, and it cannot, for there *are no such provisions*. If what the Union infers, intentionally or unintentionally, is that Company is contractually obligated to arbitrate discharges of all supervisors who have been promoted to supervisorial status from the bargaining unit when such discharges are based on their performance or conduct as supervisors, then Union is simply overreaching for an extension of the collective bargaining agreement to persons who are not covered thereby for the reasons set forth in Company’s Opening Brief.

During trial, the lower court seemed to recognize that even if the discharge were overturned on the first ground, it would still have to stand on the basis of the latter two:

“ . . . But it seems to me that if you say — I mean, just for the sake of argument — that Point No. 1 is something that really they shouldn't be allowed to discharge him for now, they might demote him if they felt that he wasn't proper supervisory material. Then if they did attempt to discipline him for his conduct at that time, then the Union would, of course, be directly interested, and it would have to go to arbitration as to whether or not he would be discharged. But when it comes to his conduct after he becomes a part of management, then the question is *who* is to say what is or isn't material misconduct. *The Union is not in a position to do that.*

“It seems to me this is something management has to say. So even if you would find the arbitrator had jurisdiction over Point No. 1 and said, ‘No, they can't fire him for that,’ they would still be able to fire him for Point No. 2. And if that's the case, why then we are just going in circles, because it would come right back and they would fire him anyway.”
(Tr. 21-22.) (Emphasis added.)

Company submits that the foregoing observation was and is correct. It would be a futile act to require Company to arbitrate one ground for discharge when the results of such arbitration would not change the fact that Cherney was discharged for two other reasons which are beyond the ambit of the arbitrator's authority.

CONCLUSION

For all the reasons stated in Company's Opening Brief and in its Reply Brief, it is respectfully submitted that the decision of the lower court was erroneous and should be reversed.

Respectfully submitted,

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RICHARD C. WHITE

By RICHARD C. WHITE
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Attorneys for Appellant
General Telephone Company
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD C. WHITE

Richard C. White

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS PEREZ CERDA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

~~FILED~~

~~DEC 26 1967~~

~~WM. B. LUCK, CLERK~~

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

JAN 5 1968

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FOR THE NINTH CIRCUIT

LOUIS PEREZ CERDA,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS PEREZ CERDA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, LOUIS P. CERDA, was indicted on March 1, 1967, by the Federal Grand Jury for the Central District of California and charged in two counts with violations of Title 21, United States Code, Section 174 and one count with violation of Title 26, United States Code, Section 4705(a) [C. T. 2]. ^{1/}

Count One of Indictment #37033-CD charges that on or about September 9, 1966, in Los Angeles County, appellant knowingly and

^{1/} "C. T. " refers to Clerk's Transcript of Record.

unlawfully received, concealed and facilitated the concealment and transportation of 10.900 grams of heroin, a narcotic drug, which, as the appellant then and there well knew, previously had been imported into the United States of America contrary to United States Code, Title 21, Section 174.

Count Two relates to the same date as in Count One and charges that appellant knowingly unlawfully sold and facilitated the sale of the same quantity of heroin as in Count One to an undercover assistant of the Federal Bureau of Narcotics.

Count Three relates to the same date and quantity of heroin and charges the unlawful sale to an undercover assistant of the Federal Bureau of Narcotics without obtaining a written order on a form issued for that purpose by the Secretary of the Treasury of the United States in violation of Title 26, United States Code, Section 4705(a).

On March 13, 1967, appellant was arraigned in Case No. 37033-CD before the Honorable E. Avery Crary, United States District Judge. Counsel was appointed to represent appellant and a plea of not guilty was entered whereupon the trial of the case was transferred to the Honorable Irving Hill, United States District Judge [C. T. 6]. On that same date, appellant and his counsel appeared before Judge Hill and jury trial of this case was set for April 4, 1967 [C. T. 5].

On March 28, 1967, Doctor Karl Von Hagen was appointed by the court to examine appellant [C. T. 7]. On April 4, 1967, appellant and his counsel again appeared in Federal Court before

Judge Hill and jury trial of case No. 37033-(IH)-CD was continued to April 25, 1967 [C. T. 11]. On April 11, 1967, Doctor Eric Marcus was appointed to examine appellant [C. T. 17].

On April 25, 1967, appellant represented by court appointed counsel again appeared before Judge Hill. After hearing testimony regarding appellant's mental competency and physical health, the court found appellant legally sane and able to cooperate with his counsel and able to stand trial. Appellant then moved the court for a continuance which motion was heard and denied after presentation of testimony. A jury was then impaneled and the trial of the case commenced [C. T. 24].

On April 26, 1967, defendant was found guilty as charged in Counts One and Two and not guilty as charged in Count Three [C. T. 27, 28]. On April 27, 1967, appellant was committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten years for the offense charged in Count One and for a like period of ten years for the offense charged in Count Two and it was further adjudged that the two ten-year sentences of imprisonment imposed commence and run concurrently making a total imprisonment of ten years [C. T. 29, 30].

On May 1, 1967, appellant filed a motion for a new trial which motion was heard and denied by the court on May 22, 1967 [C. T. 31-36, 46].

On May 4, 1967, defendant filed a timely notice of appeal [C. T. 37].

The offenses charged in Indictment No. 37033-IH-CD occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174 and Title 26, United States Code, Section 4705(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Section 174, Title 21, United States Code, provides in pertinent part:

"Whoever . . . knowingly . . . received, conceals, buys, sells or in any manner facilitates, transportation, concealment or sale of any . . . narcotic drug, after being imported or brought in, knowing the same to having been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than five or more than twenty years and in addition may be fined not more than \$20,000.

"For a second or subsequent offense . . . the offender shall be imprisoned not less than ten or more than forty years and in addition may be fined not more than \$20,000.

"Whenever on trial for violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. "

Section 4705(a), Title 26, United States Code provides in pertinent part that:

"It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given on a form to be issued in blank for that purpose by the Secretary or his delegate. "

III

STATEMENT OF FACTS

On September 9, 1966, at approximately 10:00 A. M. , Federal Bureau of Narcotics Agent Edward Heath, while under the surveillance of other Federal agents, met with Mr. Charles Holmes at his residence. There Agent Heath searched Mr. Holmes for monies or narcotics with negative results [R. T. 119]. ^{2/} Agent

^{2/} "R. T. " refers to Reporter's Transcript of Record.

Heath had been advised that appellant, known as "Skippy", and Bill McGowen would arrive at the residence and that negotiations for the sale of heroin would then take place [R. T. 109].

At about 1:20 P. M. appellant and Mr. McGowen arrived at Mr. Holmes' residence in a 1959 Chevrolet belonging to appellant's wife and driven by him [R. T. 153]. Agent Heath was then introduced to appellant and Mr. McGowen for the first time outside the residence [R. T. 95-96, 195]. As per the appellant's instructions Agent Heath entered the 1959 Chevrolet and appellant proceeded to drive around the Los Angeles area. Enroute appellant questioned Agent Heath in regards to where he was living and how much "dealing" Agent Heath had done in an apparent effort to break down Agent Heath's undercover guise. Appellant finally agreed to sell him a half an ounce of heroin for \$100 [R. T. 96-97]. Appellant then stopped, exited the vehicle, and went to a phone booth where he appeared to place a telephone call [R. T. 98, 120]. Upon his return to the vehicle, appellant stated that his "connection was ready" and that he would take Agent Heath and the others to another location since Agent Heath "could not meet the source of supply" and that he, appellant, "would take the money, pick up the heroin and come back" [R. T. 99].

Appellant then drove Agent Heath, Mr. Holmes and Mr. McGowen to the area of Mark Keppel High School in Alhambra, California and instructed them to remain there [R. T. 99, 121]. Agent Heath, Mr. Holmes and Mr. McGowen exited the vehicle at this location. Appellant then asked for the \$100 for the heroin which

money was given to him by Agent Heath [R. T. 99, 121].

About 10 minutes later, appellant returned to this location whereupon he drove Agent Heath, Mr. Holmes and Mr. McGowen back to Mr. Holmes' residence. Appellant had gone to his source of supply to obtain the heroin [R. T. 153]. Enroute to Mr. Holmes' residence Mr. Cerda handed Agent Heath a Pall Mall package containing two rubber balloons filled with a brownish powdery substance [R. T. 100]. At Mr. Holmes' residence, Agent Heath and Mr. Cerda discussed future purchases of heroin [R. T. 100, 124]. After appellant and Mr. McGowen had left the area Agent Heath again searched Mr. Holmes for monies or narcotics with negative results [R. T. 133]. It was subsequently determined by a chemical analysis that the two rubber balloons contained approximately 10.900 grams of heroin [R. T. 84-85].

Appellant had previously been convicted for a similar offense [R. T. 133-134].

IV

ERRORS SPECIFIED BY APPELLANT

Appellant has specified the following points on appeal:

1. The trial court committed prejudicial error in refusing to grant appellant's motion for a continuance of the trial.
2. Appellant's motion for a judgment of acquittal made at the close of the Government's case on the grounds of insufficiency of the evidence, or in the alternative, that entrapment had been

shown as a matter of law should have been granted by the trial court.

3. The "procuring agent" instruction with respect to the allegations in Count One of the Indictment as to receiving, concealing and facilitating the concealment and transportation of a narcotic drug and with respect to the facilitation of a sale of narcotics as alleged in Count Two of the indictment should have been given by the trial court.

V

ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT
PREJUDICIAL ERROR IN REFUSING TO
GRANT APPELLANT'S MOTION FOR A
CONTINUANCE OF TRIAL.

The continuance of a trial is directed to the sound discretion of the trial court and a denial of a continuance may be reviewed by this Court only where the discretion has been abused. Scott Corp. v. Kent, 309 F.2d 891 (1962), cert. denied 372 U.S. 982. Appellant in his opening brief fails to establish how the denial of the continuance by the trial court was an abuse of discretion.

Appellant first appeared in Federal Court on March 13, 1967, at which time trial of the case was set for April 4, 1967. Trial was then continued until April 25, 1967 and it was on this occasion that appellant made his motion for a continuance. At no time did appellant make a request that the government subpoena the informant nor did the appellant himself issue such a subpoena. As appellant

himself indicates in his opening brief, the Government had advised him of the identity of the informant and that he would be available to him at the time of the trial. However, it is clear that the Government is not the guarantor of the informant's presence at trial. See United States v. D'Angiolillo, 340 F.2d 453 (2nd Cir.), cert. denied 380 U.S. 955 (1965).

Appellant cites Roviaro v. United States, 353 U.S. 53 as authority for his contention. However, Roviaro is not controlling since in that case the Government refused to disclose the identity of the informer whereas in the case at hand appellant was fully advised well in advance of the trial date of the identity of the informant. Further, in Roviaro the court stated that it could not be assumed that the informer was known to appellant and available to him as a witness. However, in the present case the record establishes that appellant was well acquainted with Mr. Holmes, the informant, and knew where he resided.

In Velarde-Villarreal v. United States, 354 F.2d 9 (9th Cir. 1965), it was held that if the government was actually unable by reasonable effort to produce the informant, that such inability would not require a dismissal of the case, unless of course, the government itself purposely saw to it that the informant disappeared. At page 12 the court said, "We know of no rule that the government is under any general obligation to produce an informer".

In the case at hand the government did make a reasonable effort to produce Mr. Holmes and continued to make such reasonable effort throughout the trial of this case. Federal Agent Antonio

Celaya testified that he was acquainted with Mr. Holmes, an undercover assistant; that he did not know the present whereabouts of Mr. Holmes; and that about one month before trial he called Mr. Holmes at his residence and determined that the phone had been disconnected for some time. Agent Celaya then personally went to the residence but was unable to locate anyone. He then checked the neighborhood and was advised that Mr. Holmes had moved. He then spoke with persons acquainted with Mr. Holmes and none had heard from him for some time. One person did state that Mr. Holmes might be in Oklahoma but Agent Celaya was unable to determine where in Oklahoma. Agent Celaya then inquired about Mr. Holmes' whereabouts with other persons without success. In addition Agent Celaya checked Mr. Holmes' employment and it was determined that Mr. Holmes had terminated his employment approximately 4 months previously, and had never returned. Agent Heath testified that he assisted Agent Celaya in an attempt to locate Mr. Holmes by calling the police department and it was determined that Mr. Holmes was not in custody. During the course of trial, Agent Heath and Agent Celaya continued to make an effort to locate Mr. Holmes without success. The court after hearing the foregoing testimony and reading the informant's statement, which statement was offered and admitted into evidence for the purposes of this hearing only, determined that the government in good faith attempted to bring Mr. Holmes forward as a witness and had made no effort to conceal him or his part in the transaction and that there was no assurance whatsoever that a continuance for any given period of

time would assure his presence [R. T. 30-48].

It is therefore respectfully submitted that the trial court did not abuse its discretion in denying appellant's motion for a continuance.

**B. THE EVIDENCE WAS SUFFICIENT TO
SUSTAIN THE CONVICTION AND
APPELLANT WAS NOT ENTRAPED
AS A MATTER OF LAW.**

Appellant contends that the evidence was insufficient to sustain the conviction and in the alternative that entrapment was shown as a matter of law. It is the government's contention that the facts and circumstances surrounding the September 9, 1966 transaction compel the conviction.

In a criminal case evidence on appeal is viewed in the light most favorable to the government. Hiram v. United States, 354 F.2d 47 (9th Cir. 1965); Stein v. United States, 337 F.2d 14, 16 (9th Cir. 1964); Mosco v. United States, 321 F.2d 180, 181 (9th Cir. 1963), cert. denied 371 U.S. 842. This rule also includes all inferences to be drawn from the evidence. Yeargain v. United States, 314 F.2d 881, 882 (9th Cir. 1963).

Until his introduction by Mr. Holmes, Agent Heath was a stranger to the appellant, yet Agent Heath, not the informant, was the one actually purchasing the heroin. In addition appellant admitted that he desired to get something out of this purchase and did not want to give up his source of supply of heroin. His story that he

agreed to obtain the heroin only because of the insistence of a friend is inconsistent with these circumstances. See Matysek v. United States, 321 F.2d 246 (9th Cir. 1963), cert. denied 376 U.S. 917. Also, if the appellant were merely doing this as a favor to a friend one might ask why he took such meticulous precautions both at Mr. Holmes' residence and at the area around Mark Kepple High School.

Appellant admitted on the stand that he became directly involved in this illicit transaction because " . . . if I introduce Mr. Holmes to my source of supply, he doesn't have to come to me, in case I was broke in the future and he want to get some, he can go directly to the source and I wouldn't make anything out of this." [R. T. 201].

The appellant's predisposition to commit the offense is relevant to the question of entrapment. Cf. Sorrells v. United States, 287 U.S. 435 (1932). Appellant was willing to meet and subsequently did meet with Agent Heath for the purpose of obtaining and selling heroin. Such a subsequent act may be considered as indicating a predisposition to commit the offense as charged. Trice v. United States, 211 F.2d 513 (9th Cir. 1954), cert. denied 348 U. S. 900.

Where, as here, the only evidence of entrapment is the appellant's own testimony. The prosecution need not produce evidence to the contrary since the jury may choose to disbelieve the appellant. United States v. Thomas, 351 F.2d 538 (2nd Cir. 1965). At page 539 that court commented:

"Presumably once entrapment is undisputedly shown by government witness as in Sherman v. United States, supra, the government would have to introduce testimony to show willingness. The rule is otherwise when defendant himself raises entrapment in his testimony. The trier . . . is permitted to disbelieve him and did." See also United States v. Masciale, 236 F.2d 601 (2nd Cir. 1956); United States v. Pugliese, 346 F.2d 861 (2nd Cir. 1965).

Furthermore the government established ample reason why the appellant should not be believed. The appellant had a prior conviction for a similar offense. According to his own testimony he supported his narcotics habit by selling narcotics and engaging in the illicit sale and traffic of heroin. Further, it was appellant's, not the informant's, source of supply of the heroin which source appellant did not want to lose. In addition, according to his own testimony, appellant fully expected to make something out of this illicit transaction. Certainly these facts alone are sufficient to rebut appellant's contention that entrapment had been established as a matter of law and to warrant sending the question to the jury.

In any event, an appellant who claims as does appellant Cerda, that he was merely a procuring agent for the purchaser thereby denying the sale, cannot raise the defense of entrapment as to the sale counts and here the sentence imposed is concurrent as to each of the counts upon which appellant was convicted. Dunbar

v. United States, 342 F.2d 979 (9th Cir. 1965).

The cases cited by appellant are not dispositive of the problems now before the court. In Sherman v. United States, 356 U.S. 369 (1958), the evidence of entrapment appeared, unlike the present situation, in the prosecution's own case. Furthermore, the court there emphasized the appellant's undisputed efforts to rehabilitate himself. Here the appellant himself testified that he was addicted at the time of the offense and that he sought to traffic in narcotics in order to sustain his addiction and make a profit and that he did not wish to lose his source of supply.

The facts in Henderson v. United States, 261 F.2d 909 (5th Cir. 1958), in which the court found entrapment established as a matter of law, differs substantially from the present situation. The appellant there was neither a user nor a seller of narcotics. The purchaser of the heroin there was friendly with the appellant rather than a stranger as in the case at hand. Furthermore, the informant there told the appellant where to get the narcotics and even furnished the specific telephone number for that purpose and there was no showing there that the appellant profited from the transactions. These facts therefore present an entirely different case from the one presently under consideration.

In Morales v. United States, 260 F.2d 939 (6th Cir. 1958) the appellant was not an addict and had no prior criminal record. At page 940 the court stated:

"There was no proof that appellant had any contact with persons engaged in the illicit sale of

narcotics nor any evidence whatsoever of circumstances that would justify even a reasonable suspicion that he was engaged in the traffic."

Certainly in the present case we have considerably more than "reasonable suspicion" that appellant was engaged in narcotics traffic. We have his own admission to such.

C. THE PROCURING AGENT INSTRUCTION WAS PROPERLY GIVEN BY THE TRIAL COURT.

Whatever may be the law in other circuits, it is clear that in the 9th Circuit an appellant who establishes that he was a mere procuring agent can be convicted of those counts charging facilitation. Vasquez v. United States, 290 F.2d 897 (9th Cir. 1961); Bruno v. United States, 259 F.2d 8 (9th Cir. 1958).

In the case at hand, Count One of the Indictment charges the concealment and transportation and the facilitation of the concealment and transportation of approximately 10.900 grams of heroin in violation of 21 U.S.C. 174; Count Two charges the sale and the facilitation of the sale of the same quantity of heroin in violation of 21 U.S.C. 174 and Count Three charges the sale of heroin in violation of 26 U.S.C. 4705(a). Appellant requested, and the court gave, the "procuring agent" instruction to the effect that the appellant was not guilty if he acted as an agent of another. This instruction was given with respect to Count Three and that portion of Count Two charging the sale of the heroin but was not given as

to the charge with respect to Count One and that portion of Count Two charging the facilitation of the sale. Appellant now claims that this was error under Prince v. United States, 264 F.2d 850 (C. A. 3). In the Prince case, the court held that a showing that a defendant acted as a procuring agent for the buyer rather than as the seller would constitute a defense to a charge of facilitating the sale of a narcotic drug. In so holding the 3rd Circuit stands alone and its rationale has been rejected by the 9th Circuit. Cf. Bruno v. United States, supra; Vasquez v. United States, supra; and others, Lewis v. United States, 337 F.2d 541 (C. A. D. C.); United States v. Simons, 374 F.2d 993 (C. A. 7). Moreover, two of the cases upon which Prince relied i. e. Sawyer v. United States, 210 F.2d 159 (C. A. 2); and Adams v. United States, 220 F.2d 297 (C. A. 5) held only that a procuring agent could not be a seller of a narcotic drug under the provisions of 21 U. S. C. 174. These cases do not hold that the procuring agent should be acquitted of facilitating the sale. The court in Prince also relied on United States v. Dornblut, 261 F.2d 949 (C. A. 2). There is nothing in the Dornblut decision, however, that suggests the rule announced in Prince. Moreover, the Prince decision itself does not bar the conviction of a procuring agent for facilitating the transportation and concealment of heroin as charged in Count One of the present case. Cf. Vasquez v. United States, supra.

It is thus respectfully submitted that the court did not commit prejudicial error in limiting the "procuring agent" instruction to Count Three and the applicable portion of Count Two rather than to

all three counts of the Indictment.

VI

CONCLUSION

For the reasons stated above, the appellee respectfully prays that the judgment of conviction be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez
GABRIEL A. GUTIERREZ

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**CONSTRUCTION & GENERAL LABORERS' UNION LOCAL
270, INTERNATIONAL HOD CARRIERS, BUILDING
AND COMMON LABORERS' UNION OF AMERICA,
RESPONDENT**

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
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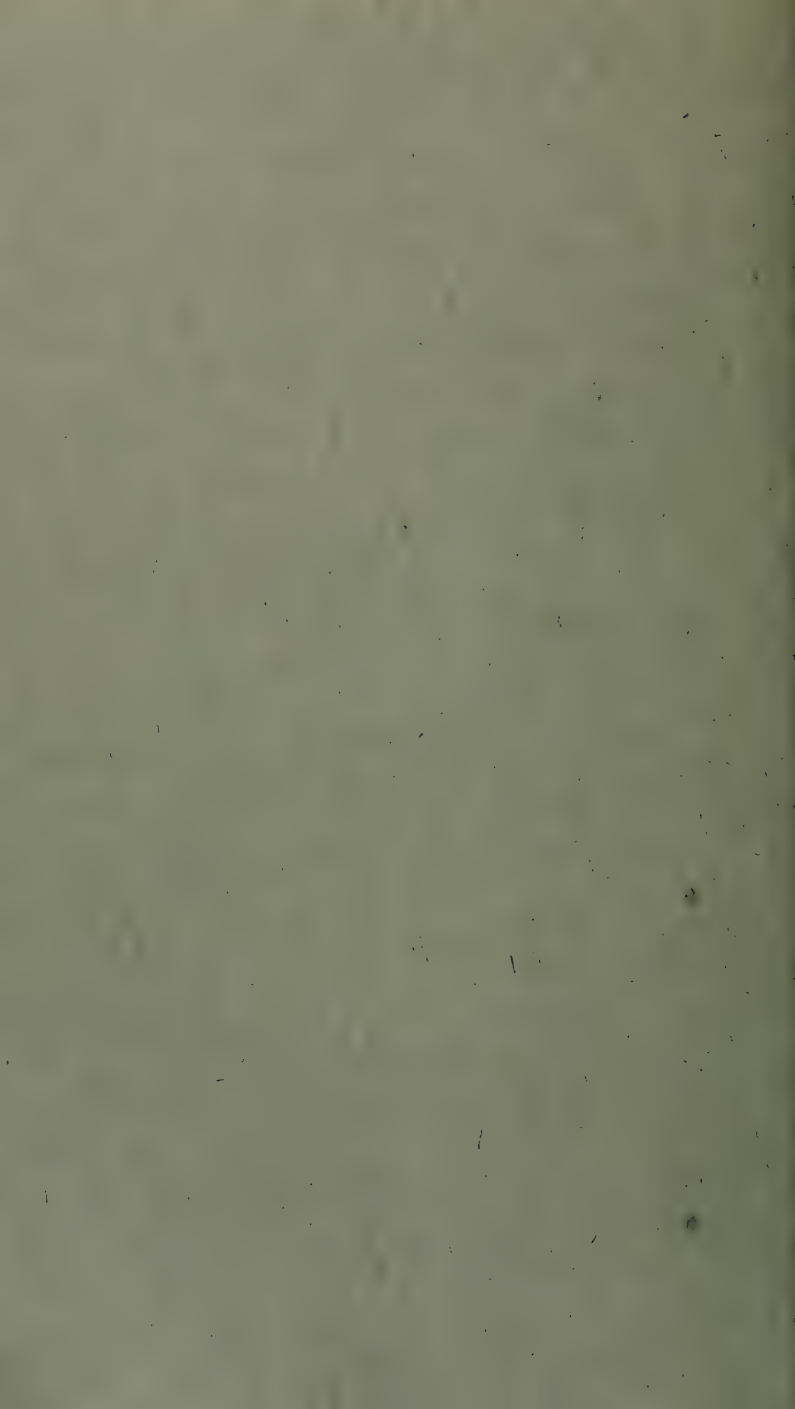
National Labor Relations Board.

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21,936

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CONSTRUCTION & GENERAL LABORERS' UNION LOCAL
270, INTERNATIONAL HOD CARRIERS, BUILDING
AND COMMON LABORERS' UNION OF AMERICA,
RESPONDENT

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon the petition of the Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),¹ for enforce-

¹ Pertinent provisions of the Act are set forth *infra*, pp. 20-22.

ment of its order, issued against respondent on November 29, 1966 (R. 31-32, 37-38)² and reported at 161 NLRB No. 117. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred on the campus of Stanford University in Palo Alto, California. No issue as to the Board's jurisdiction is presented (R. 16; Tr. 9).

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by inducing and encouraging an employee of a neutral employer to cease performing services, and by threatening, coercing and restraining neutral employers, all with an object of forcing those employers to cease doing business with Hans V. Eggli, and for the purpose of forcing Eggli to recognize and bargain with respondent, although respondent had not been certified as the representative of Eggli's employees under Section 9 of the Act. The evidence on which these findings are based is summarized below.

A. Background; Aguilar threatens White's superintendent with a work stoppage

In the spring of 1965,³ Howard J. White, Inc., was general contractor for the construction of the Mc-

² References designated "R." are to Volume I of the record reproduced according to Rule 10 of the Rules of this Court. "Tr." references are to the reporter's transcript of testimony as reproduced in Volume II of the record.

³ All dates hereafter are in 1965, unless otherwise specified.

Cullough Building, a research building at Stanford University. White had subcontracted the landscaping work on the project to the firm of Hans Eggli (R. 17; Tr. 43). On the morning of April 6, Gregory Aguilar, respondent Union's assistant business representative, visited the jobsite and approached laborer Aurelio Ramirez, who was digging a ditch. Aguilar told Ramirez that he was "from the Union" and asked the latter for his union card. Ramirez answered that he did not have a card. Aguilar next asked Ramirez who employed him and what salary he was earning. Ramirez answered that he worked for Eggli and that his salary was \$2.85 per hour. Aguilar said that Ramirez was "supposed to get from \$3 up for the job" and asked the latter "how come" he did not have a union card (R. 17; Tr. 36-37). Ramirez answered that most of Eggli's work was done in private homes and that Eggli had "no trouble with the Unions" (*ibid.*). After some further conversation, Union Representative Aguilar said that he would return at 1:00 o'clock and speak to Eggli (R. 17; Tr. 38).

When Aguilar returned that afternoon, he did not meet Eggli. He did, however, approach Alexander McCullough, White's superintendent at the Stanford project. Aguilar asked McCullough if he knew that Eggli was non-union. McCullough replied affirmatively. Aguilar asked why White permitted non-union personnel on the job, since all of White's employees were union members. McCullough replied that Eggli had a contract to do the work, and that,

as far as he (McCullough) was concerned, Eggli would remain on the job. Aguilar asked if "there was any way [White] could reconcile the thing to where Eggli would have to leave" and, if that could not be accomplished, "then he [Aguilar] would ask his Union personnel on the job to leave" (R. 18; Tr. 44). Aguilar added that "if Eggli wasn't going to leave, then he would ask his Union members to leave the job". (R. 1819; Tr. 44, 59-61.) Later that day, McCullough reported to Eggli the substance of his conversation with Aguilar, and asked Eggli "how he intended to proceed with his work," in view of the Union's objections to "his having non-Union personnel on the job." Eggli replied that he would "complete the job in some manner [although] he didn't know just how [he] would go about it . . . (R. 20; Tr. 46-47).

B. Aguilar induces and coerces B & C to cease work

On the following day, April 7, Union Representative Aguilar again visited the jobsite. He approached Superintendent McCullough and asked him if Eggli's employees were on the job that day. McCullough replied, truthfully, that they were not (R. 20; Tr. 45-46).⁴ Aguilar asked McCullough what he and White

⁴ At the Board hearing, during cross-examination by counsel for respondent, McCullough was asked why Eggli and his men were not working that day. McCullough replied as follows (Tr. 61-62):

A. The reason he was not working was that he was aware of the situation as such. He had told me that when I had asked him how he was going to accomplish his

had decided to do about Eggli. McCullough answered that he did not know. Aguilar also told McCullough that, as a union man, McCullough had a duty to "make sure that there were no non-union personnel on the job" (R. 20; Tr. 46).

Aguilar then approached employee Jerry Clement, who was digging a ditch with a trenching machine. Clement was employed by B & C, Inc. of Burlingame, California, which had been retained by Eggli, pursuant to an oral contract, for the purpose of digging trenches for an irrigation system. Clement, although nominally a working foreman at B & C, which was owned by his father, had no employees under him at the McCullough Building jobsite, as he was the only B & C employee assigned to that project (R. 21; Tr. 19, 22, 27, 29, 83). Aguilar tapped Clement on the shoulder and asked for his union card. Clement replied that he did not have his union card with him but that he had a work clearance from Local 389,

work. He told me that he didn't know how he was going to accomplish it, but he couldn't work under the conditions as they were.

The cross-examination continued with the following questions and answers (Tr. 62):

Q. . . . What conditions were in existence that would lead him to say that?

A. He told me that he was being harassed.

* * * *

Q. (By Mr. Carroll) Mr. McCullough, was it your understanding that Mr. Eggli was not working on this day which we are speaking about solely because he was fearful of potential Union harassment?

A. Right.

Construction and General Laborers' Union, of which he was a member. When Clement had difficulty locating his clearance, Aguilar accused him of working for Eggli and told him that he "would have to leave the job, that this is a Union job and that [he] had to get off" (R. 21; Tr. 15, 24).

At length, Clement found his work clearance from Local 389 and showed it to Aguilar, who expressed some skepticism at its authenticity and asked Clement what his wages were. Clement answered that he made \$5 an hour. Aguilar laughed and said that "that was really funny . . . Hans Eggli never paid anybody in his life \$5 an hour." Clement again protested that he was not working for Eggli. Aguilar answered that ". . . this was a Union job and he didn't want any non-Union people on this job . . . that he was really firm against it . . ." and that he would "work days, nights or Sundays, whatever he had to, to make sure there wasn't any non-Union help on the job." Clement reiterated that his employer, B & C, was a union firm and he "didn't see too much of what the problem was although [he] didn't understand the technicalities involved in this type of thing" (R. 21; Tr. 17). Aguilar replied that Clement "could get himself caught up in between a labor dispute here if [he] didn't get off the job." Aguilar added that "he could go to Mr. White . . . the general contractor . . . and see to it that he closed down the job . . . the building was almost done . . . but the windows were left to be cleaned, and the building before it could be turned over had to be cleaned, and the win-

dows had to be washed . . . he could pull the window washers off. The window washers were all Union. He could pull them off the job and stop the job that way . . .” Aguilar said that “he would suggest very strongly that [Clement] leave, that there was a labor dispute on this thing. He was going to get Hans off the job . . . he was familiar with Hans Eggli’s operation, and he knew that he was non-Union. He definitely wasn’t going to work on that job, and . . . he wanted [Clement] off and . . . he would appreciate it if [Clement] would leave” (R. 21; Tr. 17-18). Aguilar added, “. . . in a situation like this, you never know what is going to happen” (Tr. 24). After concluding his remarks, Aguilar walked over to his car in order to determine whether or not B & C was listed in a book containing the names of firms in the area which were in good standing with the Union. At the same time, Clement saw Eggli on the other side of the building. He approached Eggli, told the latter about his conversation with Aguilar, and informed him that he “didn’t want to get caught in the middle because [B & C had] Union help because [they were] a Union firm, and [they couldn’t] afford to get caught in the middle of these things.” Clement told Eggli that he wanted to call his father. Eggli said, “Well, go ahead. I don’t want you to get in any type of trouble on this thing” (R. 22; Tr. 18-19). Clement went to Aguilar, who told the former that his (Aguilar’s) book listed B & C as a “good Union firm”; he declared, however, that “it would be best” if they left the job (R. 22; Tr. 20). Clement called

his father, the president of B & C, and explained the situation. After some deliberation, his father called back and told Clement "to get off the job . . . [because] this guy could get [them] in trouble down there, and [they] couldn't afford to do that . . . [they] had too many other jobs going with the other contractors" (R. 22; Tr. 20-21). Clement then left the job, although his work was not yet completed. B & C never did finish the job for which Eggli had retained them (R. 22; Tr. 21).

C. Respondent threatens White's vice-president with a work stoppage

On April 7, 1967, John Pierini, respondent's business representative, telephoned Conroy Betts, White's vice-president. Pierini told Betts that "one of his [Pierini's] men had been out on the job and that [White's] landscaping contractor, Hans Eggli, was using non-Union laborers." Pierini added that "having non-Union laborers on the job could create some problems and he might have to [pull] his men off the job if they continued to work on the job" (R. 23; Tr. 66). Betts asked Pierini if the latter had spoken to Eggli. Pierini replied that he had had "several conversations with [Eggli] but apparently Eggli had no intention of signing an agreement with them." Betts asked what Pierini wanted him to do. Pierini replied that Betts should call Eggli and try to persuade the latter to "sign up with the Union." If Eggli refused, Betts was to tell him that "if he continued to use non-Union laborers [Betts] might have

to remove him from the job and have someone else complete his work.” Betts stated that he considered this to be Pierini’s function but that he would call Eggli as requested. Pierini repeated that “he would pull his men off the job” if White permitted Eggli to continue working on the project with non-union labor (R. 23-24; Tr. 67-68).

Following this conversation with Pierini, Betts telephoned Eggli and told him that the project was in danger of being shut down because of him, that White did not want “any work stoppages on the job and that if [Eggli] couldn’t straighten out the matter [Betts] would have to take him off the job.” Eggli assured Betts that “he would take care of it,” and Betts said that he would “[leave] it strictly in [Eggli’s] hands” (R. 25; Tr. 67-68). Subsequently, Eggli finished his assigned job by working on weekends, although personnel on that project did not normally work weekends (R. 25; Tr. 62-63, 75, 85-86).

II. The Board’s Conclusion and Order

On the foregoing facts, the Board found that respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act by inducing and encouraging Clement to refuse to perform services which B & C had contracted to perform for Eggli and by threatening and coercing B & C and White with the object of forcing these employers to cease doing business with Eggli, all for the purpose of requiring Eggli to bargain with respondent even though respondent had not been certified as the collective bargaining representative of

Eggli's employees. The Board's order requires respondent to cease and desist from the unfair labor practices found and to post the usual notices (R. 30-31, 37-38).

ARGUMENT

Substantial Evidence on the Whole Record Supports the Board's Finding That Respondent Violated Section 8(b)(4)(i) and (ii)(B) of the Act

Section 8(b)(4)(i) and (ii)(B) of the Act, as amended in 1959 (see *infra* p. 20) provides that a union or its agents may not "induce or encourage any individual" employed in an industry affecting interstate commerce, or "threaten, coerce or restrain any person" in commerce, where an object is either to force the cessation of business relations between a neutral employer and any other person, or to force any other employer to bargain as the representative of his employees unless the union has been certified by the Board as the representative of such employees. This section renders unlawful the use of a secondary boycott to implicate neutral employers in disputes not their own. See *N.L.R.B. v. District Council of Painters No. 48 and Paint Makers Local Union No. 1232*, 340 F. 2d 107 (C.A. 9), cert. denied, 381 U.S. 914; *Retail Fruit and Vegetable Clerks Union, Local 1017 v. N.L.R.B.*, 249 F. 2d 591 (C.A. 9).

In the instant case, as set forth in the Statement, White, a union firm and the general contractor for construction of the McCullough Building at Stanford University, subcontracted the landscaping work to

Eggli, a non-union firm which had consistently refused to “sign up with the Union.” Eggli engaged a union firm, B & C, to dig trenches as part of the landscaping. In displeasure over discovering Eggli’s use of “non-union personnel” on the project, respondent quickly resorted to pressure to remove that employer from the jobsite. This included an insistence by Union Representative Aguilar that Jerry Clement, B & C’s sole worker at the site, leave the job or respondent would close it down by “pulling off” every union employee. This was accompanied by an admonition that Clement should not get involved in the middle of a labor dispute, that respondent “was going to get Hans [Eggli] off the job” as he was non-union, and that Clement should leave the project as “you never know what is going to happen.” As a result, B & C did withdraw. That Aguilar’s statements to Clement were calculated to “induce or encourage” an employee of a neutral employer to engage in a work stoppage, within the proscription of Section 8(b)(4)(i)(B), is manifest. *N.L.R.B. v. District Council of Painters, etc., supra*, 340 F. 2d at 110-111; *N.L.R.B. v. Local 294, Teamsters*, 298 F. 2d 105, 106-107 (C.A. 2); *N.L.R.B. v. Plumbers’ Union of Nassau County*, 299 F. 2d 497, 500-501 (C.A. 2); *N.L.R.B. v. Highway Truckdrivers and Helpers, Local 107*, 300 F. 2d 317, 319-320 (C.A. 3). Moreover, as the Board further concluded (R. 13) the application of such pressure against B & C—that is, a work stoppage by its employee—also falls squarely within the interdiction of subsec-

tion (ii), the purpose of which is not only to foreclose threats to neutral employers of such "labor trouble and other consequences,"⁵ but also to prohibit carrying out such threats by means of a "strike or other economic retaliation."⁶ Cases cited *supra*. See, in addition, *N.L.R.B. v. International Hod Carriers, Local 1140*, 285 F. 2d 397, 402-403 (C.A. 8), cert. denied, 366 U.S. 903.

The pressure brought against White was equally unambiguous. Union Representative Aguilar complained of Eggli's non-union status and told Superintendent McCullough that Eggli would have to "leave the job," and coupled the demand with a threat to "ask his Union personnel to leave" if Eggli remained. The following day Business Agent Pierini telephoned Betts, White's vice president, and insisted that Eggli's men be pulled off the job, threatening to call a work stoppage if his wishes were not followed. Pierini then asked Betts to persuade Eggli to sign a contract with respondent. When Betts hesitated, Pierini suggested that Eggli be told that Betts would have to remove him from the project if he continued to use non-union labor. Pierini then repeated Aguilar's earlier threat to "pull his men" if Eggli were permitted to continue with non-union help. These utterances were unquestionably "threats, coercion, and restraint" against a neutral employer, condemned by subsection (ii). Cases above-cited.

⁵ 105 Cong. Rec. 15532, II Leg. Hist. 1568; see 105 Cong. Rec. 8874, II Leg. Hist. 1750.

⁶ 105 Cong. Rec. 14347, 15544, II Leg. Hist. 1523, 1581.

The defenses put forth by respondent were properly rejected.

1. As shown, respondent induced Clement to stop performing B & C's work, which was being done under a contract with Eggli. This was not a legitimate, peaceful appeal to a managerial or supervisory official of a secondary employer to use his managerial discretion to cease doing business with an employer with whom a union has a primary dispute. While such appeals are not proscribed, subsection (i) does prohibit union attempts to induce or encourage managerial officials to cease performing their duties for the secondary employer. *N.L.R.B. v. Servette, Inc.*, 377 U.S. 46, 50. Clement was normally a working foreman. As the Board noted, however, he was the sole B & C employee required at the site, and was engaged as an operator of B & C equipment (R. 26). Union Representative Aguilar plainly viewed Clement in only that capacity, for Aguilar was not acquainted with B & C and made no effort at a direct appeal to its management. Rather, Aguilar immediately inquired of Clement's union affiliation. When Clement demonstrated that he worked for a union firm and was a member of a sister local, Aguilar demanded he quit working on a project tainted with the presence of a non-union employer (Eggli). This was not merely an appeal to managerial discretion to aid a union in its dispute with another employer. Rather, it was a traditional appeal to withhold services from an employer in the name of union loyalty. In the above circumstances, as this Court recognized in re-

jecting a similar reliance on the holding in *Servette*, the appeal is not "directed at the foreman's [managerial] discretion alone" and is "in violation of Section 8(b) (4) (i) (B)." *N.L.R.B. v. District Council of Painters, etc., supra* at 340 F. 2d 111-112. That something other than a management decision was intended here is confirmed by Aguilar's implication that Clement could get in trouble if the demand was not met. See *I.B.E.W. v. N.L.R.B.*, 341 U.S. 694, 700-701; *N.L.R.B. v. Local 294, Teamsters, supra*, 298 F. 2d at 106-108. And that Clement left and did not return after conferring with his father, B & C's president, is not of significance. This capitulation by a secondary employer whose work force is being subjected to union pressures is not unusual.

2. Union representatives Aguilar and Pierini denied that the incriminating utterances were made. Aguilar thus testified that he made no demands of Clement after confirming his union affiliation and that of B & C; further, that his statements to Superintendent McCullough did not go beyond a declaration that having Eggli on the job violated the collective bargaining agreement with White, and a request that McCullough arrange a meeting between respondent and Eggli to resolve the dispute (R. 18-19; Tr. 98-99). Pierini testified that he called Vice-president Betts merely to tell him that under a provision in the parties' contract White must procure Eggli's signature to the agreement (R. 24; Tr. 137-143). The Trial Examiner, however, explained at length why demeanor, corroboration, and other such factors dic-

tated his crediting of testimony which was denied by respondent's officials (R. 3-10). The Board affirmed these credibility determinations, since respondent made no showing that the testimony credited was inherently improbable on this record or that some irrational basis was used in deciding whom to believe (R. 37 n. 2). In these circumstances, the reviewing court will not disturb the resolution of conflicting testimony made by the trier of fact. See, e.g., *N.L.R.B. v. Int'l. Longshoremen's Warehousemen's Union, Local 10, et al.*, 283 F. 2d 558, 562-563 (C.A. 9); *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F. 2d 466, 469-470 (C.A. 9).

3. Respondent plainly sought to achieve the objectives proscribed by the statute. The dispute with Eggli, the primary employer, over his non-union status generated and was the express premise for the economic pressure brought against White and B & C—to whom it was made clear that such pressure would subsist until Eggli ended his non-union status by signing a union contract. White and B & C were powerless, however, to make this decision for Eggli. They were thus secondary employers who were being pressured to cancel construction contracts as a means of resolving respondent's dispute with Eggli. Respondent's attempt to interfere or to curtail those contractual relationships by improper means is a classic example of forcing a cessation of business with a disfavored employer which the Act prohibits. *N.L.R.B. v. Denver Bldg. and Constr. Trades Council*, 341 U.S. 675, 688; *I.B.E.W. v. N.L.R.B.*, *supra*, 341 U.S. at 699-700. Furthermore, the demand that

Eggli be importuned to terminate his non-union status by signing a union contract establishes beyond doubt that respondent was also bringing secondary pressure to force Eggli "to recognize or bargain," in further violation of Section 8(b) (4) (i) and (ii) (B) of the Act. *N.L.R.B. v. International Union of Operating Engineers, Local Union No. 12*, 293 F. 2d 319, 322-323 (C.A. 9); *N.L.R.B. v. International Hod Carriers, Local 1140*, 285 F. 2d 397, 398, 403 (C.A. 8), cert. denied, 366 U.S. 903; *N.L.R.B. v. Local 825, International Union of Operating Engineers, AFL-CIO*, 315 F. 2d 695, 699 (C.A. 3); compare *Scobell Chemical Co. v. N.L.R.B.*, 267 F. 2d 922, 925 (C.A. 2).

Respondent asserted that it had a right to bring pressure against White to secure his adherence to the parties' contract (see, R. 19; Resp. Exhs. 1 & 2). Allegedly the contract contained no unlawful requirement that all subcontractors be union signatories, but only a "primary" clause requiring that unit work which was subcontracted be performed at area wage standards.⁷ See, *Orange Belt District Council of Painters # 48, AFL-CIO, et al.*, 153 NLRB 1196,

⁷ The Board noted, however, that the clause in the contract was nominally a secondary provision in violation of the "hot cargo" prohibition of Section 8(e) of the Act, but exempted under the construction industry proviso to that section, discussed *infra* (R. 15). See, *N.L.R.B. v. Bangor Building and Trades Council*, 278 F. 2d 287, 290 n. 4 (C.A. 1); *District 9, Machinists v. N.L.R.B.*, 315 F. 2d 33, 36-37 (C.A. D.C.); *Meat and Highway Drivers Local 710 v. N.L.R.B.*, 335 F. 2d 709, 717 (C.A. D.C.). See also, *N.L.R.B. v. Joint Council of Teamsters, No. 38*, 338 F. 2d 23, 28 (C.A. 9).

enforced 365 F. 2d 540 (C.A. D.C.). Cf. *National Woodwork Manufacturers Association, et al. v. N.L.R.B.*, 386 U.S. 612, 638-639; *Houston Contractors Ass'n. v. N.L.R.B.*, 386 U.S. 664. As shown, however, the Board discounted the testimony of respondent's officials avowing that White's alleged contractual obligation to safeguard unit wage standards was the limit of respondent's concern. Respondent thus gave no indication that its sole and primary dispute was with White over the preservation and integrity of unit work. There is not, as the Trial Examiner observed (R. 15-16) the slightest suggestion in the record that respondent even considered that the landscaping work Eggli was performing was related to the unit work of White's employees. Furthermore, respondent's demand on White, and Eggli, went far beyond a request that work at the site be performed at area standards. The demand was that Eggli use union personnel and sign a union agreement. Finally, to further that demand pressure was brought against B & C, though it was White who allegedly was breaching a duty to maintain area standards and B & C, a union firm, was meeting those standards.

Respondent, in short, considered Eggli an unacceptable subcontractor on the project because of his non-union status and other labor policies. Respondent attempted to make Eggli alter these policies by forcing neutral employers—White and B & C—to cancel their subcontracts with Eggli. This was, as demonstrated, a clear form of secondary pressure

against a disfavored employer. Accordingly, the Board properly rejected the familiar claim that the employer with whom the union had a contract (i.e., White) was the "primary" employer in the dispute and subjected to legitimate pressures. *N.L.R.B. v. Bangor Building Trades Council*, *supra*, 278 F. 2d at 289-290; *Local 636, Plumbers v. N.L.R.B.*, 278 F. 2d 858, 864 (C.A.D.C.). Compare, *Northeastern Indiana Bldg. & Constr. Trades Council, et al.*, 148 NLRB 854, enforcement denied on unrelated grounds, 352 F. 2d 696 (C.A. D.C.); *N.L.R.B. v. International Brotherhood of Teamsters, etc., Local 294*, 342 F. 2d 18, 22 (C.A. 2). See also, *National Woodwork Mfg. Ass'n., et al. v. N.L.R.B.*, *supra*, 386 U.S. at 644-646; *Houston Contractors Ass'n. v. N.L.R.B.*, *supra*, 386 U.S. at 668.

As the Board further concluded (R. 15) respondent may place no reliance on the proviso to Section 8(e) of the Act, which grants parties in the construction industry the privilege to enter into agreements whereby the contracting employer will engage only union subcontractors on the jobsite (*infra*, pp. 20-21). By virtue of the proviso, this otherwise unlawful objective may be made a contractual arrangement. But the union is limited to judicial enforcement. The proviso does not permit the union to use economic pressure to achieve a secondary boycott condemned by the Act. *N.L.R.B. v. International Union of Operating Engineers, Local Union No. 12*, *supra*, 293 F. 2d at 323; *N.L.R.B. v. I.B.E.W., Local Union No. 683, AFL-CIO*, 359 F. 2d 385 (C.A. 6); *Local 5, United Ass'n., etc. v. N.L.R.B.*, 321 F. 2d 366, 367-

369 (C.A. D.C.), cert. denied, 375 U.S. 921; *N.L.R.B. v. International Brotherhood of Teamsters, etc., Local 294, supra*, 342 F. 2d at 22. See *Local Union No. 48, etc. v. Hardy Corp.*, 332 F. 2d 682 (C.A. 5).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Board's order be enforced in full.

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October 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful, any primary strike or primary picketing;

* * * *

[Sec. 8] (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied,

whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

* * * *

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining

order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

PURSUANT TO RULE 18(f) OF THE
RULES OF THE COURT

(Page references are to stenographic transcript)

Board Case No. 20-CC-513

GENERAL COUNSEL'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Received</u>
1 (a) through 1 (s)	8	8
2	82	82

RESPONDENT'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Received</u>
1	135	135
2	136	136

No. 21,936

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

VS.

CONSTRUCTION & GENERAL LABORERS' UNION
LOCAL 270, INTERNATIONAL HOD CARRIERS,
BUILDING AND COMMON LABORERS' UNION
OF AMERICA,

Respondent.

**On Petition for Enforcement of an Order of
the National Labor Relations Board**

BRIEF FOR RESPONDENT

**CONSTRUCTION & GENERAL LABORERS' UNION LOCAL 270,
INTERNATIONAL HOD CARRIERS, BUILDING AND
COMMON LABORERS' UNION OF AMERICA**

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Attorneys for Respondent.

FILED

JAN 15 1968

WM. B. LUCK, CLERK

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Section 8(b)(4)	2, 7, 11
Section 8(b)(4)(i) and (ii)(B)	1
Section 8(e)	7, 9, 10

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BRIEF FOR RESPONDENT

**CONSTRUCTION & GENERAL LABORERS' UNION LOCAL 270,
INTERNATIONAL HOD CARRIERS, BUILDING AND
COMMON LABORERS' UNION OF AMERICA**

STATEMENT OF THE CASE

The complaint filed by the National Labor Relations Board against the Respondent charged a violation of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Labor Management Relations Act of 1947, as amended (29 U.S.C., Sec. 151). The basic

facts involve a general contractor (Howard J. White, Inc.) who was performing work in the construction industry on a construction jobsite known as the McCullough location. White was signatory to collective bargaining agreements (Respondent's Exhibits 1 and 2) with the Respondent Union. White engaged the services of Hans Eggli, landscaping subcontractor, to perform some of the work at the above-mentioned jobsite. The work to be performed by the subcontractor was work which was mentioned in and covered by the collective bargaining agreements between White and the Union.

Eggli commenced work in April of 1965 and ended in May of 1965 (R.Tr. pp. 87, 92, 151).

THE ISSUES

1. There were no unlawful threats against, or coercion or restraint of White.
2. There were no threats or other unlawful actions against White in violation of Section 8(b)(4).
3. There was no violation of the provisions of Section 8(b)(4) with respect to the subcontractor B & C Company.

ARGUMENT

THERE WERE NO UNLAWFUL THREATS AGAINST, OR COERCION OR RESTRAINT OF WHITE.

The record is clear that no unlawful threats, coercion or restraint occurred with respect to White. Gregory Aguilar testified that he was the assistant

business representative of the Union and, in the course of a routine check of the construction jobsite on the Stanford University campus, he noticed a man doing laborers' work. He went over to the man (Ramirez), questioned him, and determined that he was working for Eggli and did not belong to the Union. Aguilar talked about substandard wages and conditions under which Ramirez was working, but such a conversion is, of course, lawful (R.Tr. pp. 36, 95, 96 and 97). The National Labor Relations Board made absolutely no determination concerning the significance of this conversation.

Aguilar returned to the job in the afternoon and talked to White's superintendent. He asked the superintendent if he knew that Eggli was a non-union contractor. Aguilar further explained that the use of a non-union subcontractor was a violation of that portion of the collective bargaining agreement which deals with the subcontracting out of work covered by the agreement under substandard conditions. The section involved is Section 11 of Respondent's Exhibit 2, which provides:

Section 11—*Subcontractors*

The terms and conditions of this Agreement insofar as it affects Employer and the Individual Employer shall apply equally to any subcontractor under the control of, or working under contract with such Individual Employer on any work covered by this Agreement, and said subcontractor with respect to such work shall be considered the same as an Individual Employer covered hereby.

If an Individual Employer shall subcontract work herein defined, such subcontract shall state that such subcontractor agrees to be bound by and comply with the terms and provisions of this Agreement.

A subcontractor is defined as any person, firm or corporation who agrees under contract with the Employer, or any Individual Employer, or a subcontractor of the Employer, or any Individual Employer to perform on the job site any part or portion of the construction work covered by the prime contract, including the operation of equipment, performance of labor and installation of materials.

An Individual Employer who provides in the subcontract that the subcontractor will pay the wages and benefits and will observe the hours and all other terms and conditions of this Agreement, shall not be liable for any delinquency by such subcontractor in the payment of any wages or fringe benefits provided herein, including payments required by Sections 28(A), 28(B) and 28(C), except as follows:

The Individual Employer will give written notice to the Union of any subcontract involving the performance of work covered by this Agreement within five (5) days of entering such subcontract, and shall specify the name and address of the subcontractor.

If thereafter such subcontractor shall become delinquent in the payment of any wages or benefits as above specified, the Union shall promptly give written notice thereof to the Individual Employer and to the subcontractor specifying the nature and amount of such delinquency.

If such notice is given, the Individual Employer shall pay and satisfy the amount of any such delinquency by such subcontractor occurring within sixty (60) days prior to the receipt of said notice from the Union, and said Individual Employer may withhold the amount claimed to be delinquent out of the sums due and owing by the Individual Employer to such subcontractor.

The Individual Employer shall not be liable for any such delinquency if the Local Union where the delinquency occurs refers any employee to such subcontractor after giving such notice and during the continuance of such delinquency.

The Individual Employer shall not be liable for any such delinquency occurring more than sixty (60) days prior to receipt of written notice from the Union.

(See, also, R.Tr. pp. 98, 99 and 117). Nothing about this conversation can be deemed to have been unlawful.

Because of the apparent violation of the collective bargaining agreement, Aguilar asked White's superintendent if some sort of a meeting could be arranged with Eggli. At this time almost no work was left to be done on the job by Eggli, but Aguilar did not want violations of Section 11 to occur in the future. White's superintendent agreed to arrange for a meeting. When Aguilar did not receive a call from White's superintendent, he went out on the job again and saw another man doing laborers' work (Clement), and asked White's superintendent about Clement. White's superintendent simply advised Aguilar that

nothing could be done about Eggli, and the conversation about Clement seems to be unclear. Aguilar then spoke to Clement and determined that he worked for another subcontractor who apparently did have a collective bargaining agreement with the Union (Clement was working for B & C Company).

The above-mentioned conversation occurred in early April. Nothing further occurred and there was no interruption of work until approximately April 26, 1965 when Aguilar again came on the jobsite and saw three men doing landscaping work. These three men refused to talk to Aguilar even though the landscaping work was covered by the agreement between the Union and White (R.Tr. p. 106). When Aguilar was unable to determine how the men got on the job and whom they worked for, and therefore could not determine whether other portions of the agreement had been violated (hiring hall provisions contained in Section 3 of Respondent's Exhibit 2), Aguilar attempted to find White's superintendent and spoke to the new superintendent who was unable to give Aguilar any information. No interruption of work occurred and the job was completed without interruption.

It is respectfully submitted that a union business agent has the right and obligation to make inquiries concerning potential violations of a collective bargaining agreement. Such conversations are lawful even if they are less than friendly, particularly in view of the fact that none of the provisions of the collective bargaining agreement were deemed by the National

Labor Relations Board to be unlawful on their face. The Board is not attempting to have any portion of the collective bargaining agreement declared unlawful and therefore it cannot declare conduct of an assistant business agent of a union unlawful when he seeks to enforce those lawful provisions of the contract or at least to determine by verbal inquiry whether or not they have been violated.

THERE WERE NO THREATS OR OTHER UNLAWFUL ACTIONS AGAINST WHITE IN VIOLATION OF SECTION 8(b)(4).

Section 11 of the collective bargaining agreement referred to previously in this brief is a lawful collective bargaining clause dealing with subcontracting in the construction industry pursuant to the provisions of Section 8(e) of the Act. Any discussions between Aguilar and White's superintendent concerning real, imagined, or potential violations of this section of the agreement would revolve, therefore, around a *primary* dispute between the Union and White as the signatory employer to the collective bargaining agreement. That is, the Union has a right to talk directly to the employer concerning that employer's violation of the collective bargaining agreement and to take steps against that employer to correct a violation. This is a clearcut action by the Union against the primary employer and therefore could not possibly be a violation of the secondary boycott provisions contained in Section 8(b)(4) of the Act.

The Board apparently misconstrued this basic issue. The Board and the General Counsel apparently take the position that discussions between Aguilar and White were improper and unlawful under the concept of "secondary boycott" because those conversations revolved around another employer, namely, Eggli and perhaps B & C. Merely because the names of those employers may have come into the conversation does not change the fact that the Union was interested in determining from White whether White had violated the collective bargaining agreement by virtue of an improper subcontract of work covered by the agreement. Under these circumstances, it is clear that any discussion between White and the Union and any statement of potential conduct by the Union with respect to White in order to vindicate its collective bargaining agreement with White is activity concerning a primary employer and not a secondary employer.

Similarly, a request by the Union directed to White to cease violating a lawful section of the collective bargaining agreement is a lawful request even though it might have the effect of having White cease doing business with Eggli. Nevertheless, such a request is not an unlawful secondary boycott since it is directed to the primary employer's violation of the agreement. Nothing in the statute prohibits such a request directed to a primary employer in the enforcement of a lawful provision of a collective bargaining agreement, even though the request might have some effect with respect to another employer. Such a clause as is con-

tained in Section 11 and the type of request made by Aguilar to White are clearly within the permissible scope of conduct allowed by the Board and the courts with respect to such clauses. See *Orange Belt District Council of Painters, No. 48, etc.*, 131 NLRB 383 (1962), remanded by the United States Court of Appeals for the District of Columbia, 328 F.2d 534 (1964), and supplemented on remand by the Board, 153 NLRB No. 80 (1965); see, also, *Woodwork Manufacturers Ass'n v. NLRB*, 18 L.Ed. 2d 356 (April 17, 1967); and *Insulation Contractors Ass'n v. NLRB*, 18 L.Ed. 2d 389 (April 17, 1967). The United States Supreme Court in the *Woodwork* case, *supra*, found that provisions similar to Section 11 were lawful and the unions in that case did not violate Section 8(e) of the Act by entering into the agreement or by enforcing its terms, even though such enforcement affected manufacturers and employers other than the primary construction contractor. The decision of the Board in the *Orange Belt* case, *supra*, is specifically contrary to the Board's finding in the instant case. In that case the Board held:

“‘The test as to the “primary” nature of a subcontractor clause in an agreement with a general contractor has been phrased by scholars as to whether it “will directly benefit employees covered thereby,” and “seeks to protect the wages and job opportunities of the employees covered by the contract.” We have phrased the test as whether the clauses are “germane to the economic integrity of the principal work unit,” and seek “to protect and preserve the work and standards

[the union] has bargained for," or instead "extend beyond the [the contracting] employer and are aimed really at the union's difference with another employer." " "

In *Meat and Highway Drivers Local 710 v. NLRB*, 335 F.2d 709 (C.A., D.C., 1964), the Court held:

"Resolution of the difficult issue of primary versus secondary activity, as it relates to this case, involves consideration of two factors: (1) jobs fairly claimable by the bargaining unit, (2) preservation of those jobs for the bargaining unit. If the jobs are fairly claimable by the unit, they may, without violating either Section 8(e) or Section 8(b)(4)(A) or (B), be protected by provision for, and implementation of, no sub-contracting or union standards clauses in the bargaining agreements. Activity and agreement which directly protect fairly claimable jobs are primary under the Act."

[at pp. 713-714]

Since the provisions of Section 11 of the agreement involved in this case are lawful on their face and no contention is made that they are unlawful, it would seem evident that discussions seeking to enforce the clause cannot be deemed unlawful.

The proviso of Section 8(e) of the Act very clearly states that nothing in that section

"shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or sub-contracting of work to be done at the site of construction . . ."

It is obvious that the work involved here was at the site of construction and that both the Union and White are in the construction industry. It is further clear that both Eggli and B & C were subcontractors in the construction industry. Under these circumstances it is plain that Section 11 is a clause permitted by this proviso, and its enforcement or discussions concerning its violation cannot be construed as unlawful secondary activity even though they might involve an effect upon Eggli and/or B & C.

**THERE WAS NO VIOLATION OF THE PROVISIONS OF
SECTION 8(b)(4) WITH RESPECT TO B & C.**

This point need not be labored. Clement was the son of the owner of B & C and, contrary to the findings of the Board, he testified that he was the working foreman at the McCullough site with power to hire and fire and authority to contact the Union hiring hall. Clement further testified that he had no idea concerning the contents of the job when he left nor could he elucidate on whether or not there was an agreement between Eggli and B & C (which apparently was an oral agreement with unspecific terms) (R.Tr. pp. 21-23 and 29-30). Thus discussions with him were discussions with a manager and not a worker or employee and the discussions with him clearly did fall within the proper request or discussion or course of conduct permitted by the decision of the United States Supreme Court in *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964).

CONCLUSION

Under the circumstances described above, and for the reasons argued in this brief, it is respectfully submitted that the Board's petition be denied and that the order not be enforced.

Dated, San Francisco, California,
January 15, 1968.

LEVY, DERoy, GEFNER & VAN BOURG,
By VICTOR J. VAN BOURG,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

VICTOR J. VAN BOURG,
Attorney for Respondent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFONSO HERRERA BOJORQUEZ,

No. 21938

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Southern District of California
Honorable Dennis J. Donovan, District Judge

APPELLANT'S OPENING BRIEF

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A. FONSECA HERRERA BOJORQUEZ,

No. 21938

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court

for the Southern District of California

Honorable Dennis J. Donovan, District Judge

APPELLANT'S OPENING BRIEF

JURISDICTION
(Rule 18-2 (b))

Appellant was indicted in the United States District Court for the Southern District of California upon charges of smuggling marijuana and of concealing and facilitating the transportation and concealment of illegally imported marijuana in violation of Title 18, United States Code, Section 176a. (R. 2-3). He was convicted on both counts. (R. 7-8). The District Court had jurisdiction under Title 18, United States Code, Section 3231. This Court has jurisdiction to review the judgment of conviction under Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE
(Rule 18-2(c))

The indictment charged in Count One that appellant on or about December 12, 1966, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico approximately 218 pounds of marijuana. (R. 2). Count Two charged that appellant with intent to defraud the United States knowingly concealed and facilitated the transportation and concealment of approximately 218 pounds of marijuana which he knew had been imported into the United States contrary to law. (R. 3).

In a jury trial appellant was found guilty as to both counts of the indictment. (R. 7-8). He was committed to the custody of the Attorney General for concurrent five year sentences on each count, with a recommendation that he be considered for parole prior to the expiration of the sentence. (R. 8).

Evidence

On December 12, 1966, appellant drove an automobile from Mexico to the Port of Entry at San Ysidro, California. (R.T. 6-7, 13). He presented his immigration card and made a negative customs declaration. (R.T. 7-9). The inspector became suspicious, because appellant appeared to shake or tremble. (R.T. 7,9). Upon searching the auto-

mobile customs officials discovered 218 pounds of marijuana concealed within the front door panels, within and under the rear seat, and in the panels below the rear windows. (R.T. 9-10, 15-17, 50-54).

The automobile driven by appellant was registered in the name of Mr. and Mrs. Powell. It had been sold or traded to University Ford in San Diego and subsequently sold in a package deal with other used cars to Metorez Universal in Tijuana, Mexico, which at the time of trial was a defunct agency. (R.T. 26).

Appellant was arrested and interrogated by customs officers. He stated that he had picked up the vehicle in Tijuana after he had been contacted by one Roberto, a Mexican fellow, who had asked the defendant to bring the car to the Mission Valley Car Wash where the defendant stated that he had previously been employed. He was to ask for permission to use the equipment at the car wash, polish the car and return it to Tijuana. Appellant did not give the officers Roberto's last name. The officer either thought he was certain that appellant stated that Roberto gave him \$0.00 to have the work done or to do it himself. (R.T. 22-24, 85). At the time of his arrest appellant had \$56.00 in his wallet. (R.T. 24).

According to Customs Agent Ellis the 218 pounds of approximately 100 kilos of marijuana found in the

automobile was worth approximately \$30.00 per kilo or \$,000.00 in Tijuana. He also testified that the same quantity of marijuana would be worth \$218,000.00 on the illicit market in the United States. (R.T. 27). The ordinary fee to a, "mule", for driving an automobile load of marijuana across the border is \$20.00 to \$25.00. If they make a delivery in Los Angeles, they usually receive \$50.00 to \$100.00. (R.T. 86).

Appellant testified in his own behalf. He denied that he knew there was marijuana in the automobile when he drove it to the border. (R.T. 62-63). On the day in question one Jose Roberto Gutierrez delivered the automobile to him in Tijuana to take to San Diego to clean and polish it, and, if he had a chance, to wash the upholstery and clean the motor. He received \$20.00 for the work. Adequate facilities for cleaning the motor and certain cleaning products were not readily available to do the work in Tijuana. Appellant had been employed by the Minuteman Car Wash in the Mission Valley section of San Diego, where it was his custom to bring automobiles from Tijuana to clean and polish. (R.T. 58-61).

Alfonso Rodriguez testified on direct examination that he was the manager of the motor polishing department of the Mission Valley Car Wash. Appellant had been employed there, and Rodriguez did from time to time permit

him to use the equipment at the car wash to clean and polish automobiles which he brought from Tijuana. (R.T. 75-78).

Customs Agent Thane Ellis testified in rebuttal that there are car washing and motor cleaning facilities in Tijuana. (R.T. 85). He also stated, without objection by defense counsel, that he had talked with a Mr. Equilera, the manager of the Mission Car Wash in Mission Valley, who told him that appellant had been laid off approximately four months previously because of lack of work and that employees were not permitted to bring vehicles to wash on their own or to use the facilities for that purpose. (R.T. 89). There is also a Minuteman Car Wash in Mission Valley, but appellant had referred to the Mission Car Wash at the time of his arrest. (R.T. 90).

On surrebuttal Mr. Rodriguez testified that he had appellant worked at the Minuteman Car Wash. (R.T. 92).

Questions Involved

1. Was the circumstantial evidence of appellant's knowledge of the presence of the marijuana in the automobile at the time he entered the United States sufficient to enable a reasonable determination that it excludes every hypothesis except that of guilt?

2. Was appellant's Sixth Amendment right to the effective assistance of counsel violated, where his trial

counsel failed to make a motion for acquittal, failed to object to inadmissible hearsay evidence which probably prejudiced his defense, and failed to effectively clarify factual questions as to the application of the hearsay?

SPECIFICATION OF ERRORS
(Rule 18-2(d))

1. Appellant's sole defense in the trial court was that he did not know the marijuana was in the automobile. (R.T. 98). However, trial counsel failed to make a motion for acquittal. He objected to the introduction of the marijuana in evidence, but only upon the ground of a defect in the chain of custody. (R.T. 51-52). If appellant's contention is not sufficiently raised by its assertion as a defense in the trial court, then it must be urged as plain error.

2. The denial of appellant's right to effective representation of counsel was not raised in the trial court. By their nature such objections are not ordinarily so raised, and under the applicable rules the inadequacy of representation must be so gross as to be regarded as plain error.

ARGUMENT
(Rule 18-2(e))

Summary

The evidence of guilt was insufficient to support the conviction, in that it failed to exclude the reasonable hypothesis that appellant innocently brought the marijuana into the United States without knowing that it was in the automobile.

Appellant's only defense was effectively emasculated, because trial counsel made no motion for acquittal, failed to object to inadmissible hearsay evidence which the jury may have thought destroyed appellant's credibility, and failed to take action to clarify confusion as to the applicability of the hearsay.

I

THE CIRCUMSTANTIAL EVIDENCE DOES NOT
SUPPORT APPELLANT'S CONVICTION,
BECAUSE IT IS INSUFFICIENT TO ENABLE
A REASONABLE DETERMINATION THAT IT
EXCLUDES THE HYPOTHESIS THAT APPELLANT
INNOCENTLY IMPORTED THE MARIJUANA
WITHOUT KNOWING THAT IT WAS IN THE
AUTOMOBILE.

The evidence in the case at bar tending to show
that appellant knew that the marijuana was in the auto-
mobile and intended to smuggle it into the United States
was entirely circumstantial. The trial court so in-
structed the jury. (R.T. 112).

"While circumstantial evidence may
support a conviction, it must be
adequately sufficient to enable a
reasonable determination that it
excludes every hypothesis except
that of guilt." (WHALEY vs.

UNITED STATES, 362 F.2d 938, 939
(9 Cir. 1966); DAVIS vs. UNITED
STATES, No. 21,354, ___F.2d___,
(9 Cir., August 17, 1967)).

In DAVIS the appellant was arrested after being
followed from the international border to the point of
rest. From there she was transported in a sheriff's
vehicle. The next day heroin was found in the seat of the

sheriff's car where appellant had been sitting. The officer having charge of the vehicle could not with certainty exclude the possibility that the contraband was in the vehicle before Davis was transported, and despite repeated subsequent observations of the car, the contraband was not found until the next day. In these circumstances this Court held the circumstantial evidence insufficient.

The case at bar differs from DAVIS in that here the evidence excludes the possibility that the contraband was placed in the automobile after appellant was separated from it, but here there was much more opportunity for the marijuana to have been placed in the car without appellant's knowledge before appellant started to drive it. The fact that DAVIS involved a sheriff's vehicle made it less probable there than here that some third party placed the contraband in the car. The fact that in the case at bar the automobile had recently been in Mexico rather than in the United States in no way tends to increase the likelihood that the defendant rather than some other person placed the marijuana in the car.

Appellant has not contradicted the Government's evidence in any substantial respect. That evidence admits to at least two reasonable hypotheses. Either appellant smuggled the marijuana, or the true smuggler adopted a

scheme, whereby appellant would unknowingly and innocently bring the marijuana into the United States, and the smuggler would retrieve it after it had been introduced. The case for appellant's innocence is supported by his uncontradicted and corroborated explanation as to an innocent reason for bringing the car to the United States. Moreover, in view of the Government's practice of trading, "tax cuts", for information about smuggling confederates, professional smugglers are probably motivated to carry on their activities in such a fashion that the person doing the transporting has as little information as possible to give. That would be best achieved by using a wholly innocent, "rile".

Although he insists he is not, appellant in the case at bar might be guilty. However, the evidence against him is wholly circumstantial. The hypothesis of innocence here is far more convincing than it was in DAVIS. Therefore, the evidence is insufficient to support a finding of guilt, and the judgment must be reversed.

II

APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE TRIAL COUNSEL FAILED TO ASSERT APPELLANT'S DEFENSE, IN THAT HE DID NOT MAKE A MOTION FOR ACQUITTAL OR OTHERWISE ASSERT THE LEGAL INSUFFICIENCY OF THE EVIDENCE AGAINST APPELLANT, DID NOT OBJECT TO INADMISSIBLE HEARSAY OFFERED FOR THE PURPOSE OF DISCREDITING THE DEFENSE, AND DID NOT TAKE ANY EFFECTIVE STEPS TO CLEAR UP A STATE OF COMPLETE CONFUSION IN THE RECORD AS TO THE SIGNIFICANCE OF THE HEARSAY.

This Court has repeatedly held that:

"To constitute denial of the effective assistance of counsel guaranteed by the Sixth Amendment counsel must have been so incompetent or inefficient as to make the trial a farce or a mockery of justice." (PEEK vs. UNITED STATES, 9 Cir. 1963, 321 F.2d 934, 944. See also REID vs. UNITED STATES, 9 Cir. 1964, 334 F.2d 915, 919; BOUCHARD vs. UNITED STATES, 9 Cir. 1965, 344 F.2d 872, 874).

Such a showing can be made in few cases. Appellant respectfully submits that his is one of those few.

We have argued above that the evidence in the case at bar is legally insufficient under the applicable standard to support a conviction. Although trial counsel

clearly took the position that the evidence did not establish knowledge of the marijuana by his client, he at the time made a motion for acquittal or adopted any other procedure which would have enabled the trial court to pass upon the issue. Even a minimum defense required such a motion, both to give the trial court an opportunity to pass upon the issue and to protect the defendant's rights on appeal.

During redirect examination of Customs Agent Thine Ellis by the Government on rebuttal, the following occurred:

"BY MR. MILAM:

"Q. Did you check to see the Minuteman Car Wash in Mission Valley? Did you check that out at all?

"A. Yes. I called the manager, a Mr. Esquilera, of the Mission Car Wash in Mission Valley, yes; and I talked to him concerning the defendant.

"Q. Did you find out anything?

"A. He told me that Mr. Bojorquez had been laid off approximately four months ago because of the lack of work. I also discussed the point

of bringing automobiles and other vehicles into that area, and he said it was absolutely nay to all employees to bring any vehicles in the area to wash on their own; also, that they did not grant facilities to any persons to use their equipment to make -- for cleaning other cars."

(R.T. 89).

This evidence, although it was clearly inadmissible hearsay, was received without any objection by appellant's trial counsel. The failure to object is evidence of gross inadequacy of representation.

Having let the hearsay in, trial counsel was confronted with another question which he utterly failed to meet. Did the hearsay declaration refer to the same car wash about which appellant and Mr. Rodriguez testified?

As appears from the quoted portion of the transcript, counsel for the Government asked about the Minuteman Car Wash in Mission Valley, while Agent Ellis responded with reference to the Mission Car Wash in Mission Valley. (R.T. 89). On re-cross defense counsel elicited from M. Ellis the fact that there are two car washes. (R.T. 9). Ellis also said that in the interrogation at the time of appellant's arrest, appellant referred to the

Mission Car Wash. (R.T. 90). However, appellant testified that it was the Minuteman. (R.T. 59). To complicate matters further, on direct examination, Rodriguez said that he worked at Mission Valley Car Wash, but on rebuttal it was Minuteman Car Wash in Mission Valley. (R.T. 75, 92).

Manifestly, these facts have an explanation. Whether the hearsay referred to the car wash to which appellant said he was going at the time of his arrest, or it did not. Having let the hearsay in, defense counsel was under a practical necessity of taking one position or the other. His witnesses were clearly able to testify whether Rodriguez and Esquilera worked at the same car wash and, if not, whether appellant had worked at both.

Although the burden of proof was at all times on the Government, after appellant was put to his defense, the Government's strongest case could be made by showing that appellant had made false statements either during his original interrogation or at the trial. It is not unlikely -- indeed it is very probable -- that appellant was convicted by the jury on the theory that he was impeached by the hearsay statement of the car wash manager to Agent Ellis that employees were not permitted to wash automobiles on their own. If appellant's trial counsel had performed his duty, this never could have happened. Aside

from the fact that a motion for acquittal should have been granted at the conclusion of the Government's case and that the hearsay should not have been admitted in any event, it seems more probable than not that the hearsay did not even refer to the car wash in question, but related to another, at which appellant had worked before he was employed at the one in question. A conviction obtained under such circumstances is surely a mockery of justice.

CONCLUSION

The evidence in the case at bar conclusively established that appellant drove an automobile carrying marijuana from Mexico to the United States. The evidence tending to indicate that he did so with knowledge of the presence of the marijuana and intent to smuggle was wholly circumstantial. That evidence was insufficient to exclude the reasonable hypothesis that he did so innocently and without knowledge that the marijuana was in the car.

Appellant testified to an innocent reason for bringing the automobile into the United States and produced corroborative evidence. A motion for acquittal should have been granted, had his trial attorney made such a motion. He might well have been acquitted by the jury, had his counsel not permitted the introduction of inadmissible hearsay and then failed to use his witnesses to clarify confusion as to whether the hearsay was even applicable to the issue. These failures and omissions made mockery of a good defense. The judgment of conviction should be reversed.

Respectfully submitted,

LANGFORD, LANGFORD & LANE

By _____
J. Perry Langford

Attorneys for Appellant

CERTIFICATE
(Rule 18-2(g))

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Perry Langford

NO. 21938

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FONSO HERRERA BOJORQUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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NO. 21938

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THE UNITED STATES DISTRICT COURT
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFONSO HERRERA BOJORQUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty as charged in Counts One and Two of a two count indictment following trial by jury.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 231, and Title 21, United States Code, Section 176a. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Count One of the indictment charged that appellant, with intent to defraud the United States, knowingly smuggled and clandestinely introduced into the United States from Mexico approximately 218 pounds of marihuana [C.R.2].^{1/}

Count Two charged that appellant, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of approximately 218 pounds of marihuana knowing that it had been imported and brought into the United States contrary to law [C.R.3].

Jury trial of appellant commenced on January 25, 1967, before United States District Judge Dennis F. Donovan [C.R.5, R.T. 1-2].^{2/} Appellant was found guilty on both counts on January 26, 1967, and was sentenced on February 16, 1967, to the custody of the Attorney General for concurrent five year sentences on each count, with a recommendation that he be considered for parole prior to expiration of the sentences. [C.R. 7, 8].

III

ERROR SPECIFIED

Appellant specified the following points upon appeal:

"I The circumstantial evidence does not support appellant's

^{1/} "C.R." refers to the Clerk's Record on Appeal.

^{2/} "R.T." refers to the Reporter's Transcript of Proceedings.

conviction, because it is insufficient to enable a reasonable determination that it excludes the hypothesis that appellant innocently imported the marijuana without knowing that it was in the automobile . . . (Appellant's Brief p.9).

"II Appellant was denied the effective assistance of counsel, because trial counsel failed to assert appellant's defense, in that he did not make a motion for acquittal or otherwise assert the legal insufficiency of the evidence against appellant, did not object to inadmissible hearsay offered for the purpose of discrediting the defense, and did not take any effective steps to clear up a state of complete confusion in the record as to the significance of the hearsay . . ." (Appellant's Brief p. 12).

IV

STATEMENT OF THE FACTS

On or about December 12, 1966, appellant drove a 1958 Buick into the United States from Mexico [R.T. 6-7]. At the primary inspection line, which is about 50 to 70 feet inside the United States, he presented his resident alien immigration card and was shaking a little bit [R.T.7]. He gave a negative customs declaration, but the inspector was suspicious because of the trembling and pulled up the back seat and got a glimpse of some packages [R.T. 9]. After securing another officer, appellant was escorted to secondary [R.T. 9-10].

At secondary appellant was searched with negative results, but search



f the car revealed packages concealed throughout the vehicle [C.T.14, 5-17]. The packages (contained in Government's Exhibits 1 thru 9) were initialed, dated, and seized by Inspector McClain, and the appellant placed under arrest [C.T. 16-17].

Customs Port Investigator Maldonado interrogated the appellant who stated that a "Roberto" had asked him to bring the car to the Mission Valley Car Wash; appellant had previously been employed there and was to ask permission to use the equipment, polish the car and return it to Tijuana [C.T. 20-22]. Appellant was unable to describe "Roberto" and did not give his last name [C.T.22]. Appellant stated "Roberto" had given him \$40.00 for the job [C.T. 23]. \$56.00 was found in appellant's wallet [C.T. 24].

Customs Agent Ellis corroborated Maldonado's testimony that appellant gave only the name "Roberto" for the man who had given him the car, and further testified that appellant did not give sufficient information on "Roberto" to check him out; however, Ellis did check out the car registration which showed the ownership as belonging to a Mr. and Mrs. Powell, and which led from them to University Ford and then to Metorez(sic) Universal, a defunct Mexican Agency [C.T. 26]. Ellis further testified that the seized packages weighed approximately 218 pounds; that marihuana sold in Mexico in bulk for about \$30.00 a kilo; that a kilo is about 2.2 pounds but when weighed out only about 2 pounds; that in the United States the illicit market was \$1000.00 a pound [C.T.26-27]. Ellis obtained the seized packages from McClain and initialed and transported them to the seizure clerk

[C.T.28].

Testimony of the Assistant Seizure Clerk and the chemist completed the chain of custody of the government exhibits and identified them as marihuana [C.T. 30-32,35-37,50].

Appellant testified that a Jose Roberto Gutierrez(sic) gave him the car to bring to wash and clean the upholstery and the motor; he was given \$0.00 to do the work [C.T.59]. He was going to do the work at the Minuteman Car Wash in Mission Valley where he worked [C.T.59]. He had bought cars over before; facilities were better here than in Mexico [C.T. 6]. He had known "Roberto" a couple of months or so but this was the first time he had brought across a car for him [C.T.60-61]. The car was out of his sight for 15 minutes while he had breakfast [C.T. 62]. He knew nothing about the marihuana or contraband [C.T.62-63]. He was to return the car that afternoon and there was no arrangement for "Roberto" to pick it up in the United States [C.T.63]. When he was stopped at the border his car was partially in Mexican territory [C.T.65-66]. He never saw the marihuana packages and denied any knowledge of the marihuana [C.T.67-69]. He would know "Roberto" if he saw him; "Roberto" was in the car or car parts business and appellant sometimes saw him in his colony where he lived [C.T.69-70].

On cross-examination appellant admitted he only gave the name "Roberto" to the officers, stating they didn't ask for more [C.T.70]. He also admitted

there were many car wash places in Tijuana, but stated they did not have adequate equipment [C.T.71]. He stated he did not know where Gutierrez(sic) lived or much about him except that he was in the car business [C.T.71].

Alfonso Rodriguez testified for appellant and stated he (Rodriguez) was employed as a manager at the Mission Valley Car Wash [C.T.75,76], and that appellant and others brought cars in from Tijuana and were allowed to work on them when he wasn't too busy [C.T.77-78]. He attempted to testify that appellant's reputation was good [C.T.78-79], but admitted on cross-examination he had never discussed defendant's reputation [C.T.80].

Appellant's sister testified that appellant's reputation was good. [C.T.8].

On rebuttal, Agent Ellis testified that he tried to get more information about "Roberto" but appellant did not give the rest of Roberto's name [C.T.8]; that there were many car washing and motor cleaning facilities in Tijuana [C.T.85]; that all United States Border inspections are within the United States and appellant's car was inspected about 150 feet inside the United States [C.T.86]; that so-called mules are paid \$25.00 to \$100.00 for transporting marihuana across the line [C.T.86]; and that no fingerprints were taken off the car or packages [C.T.87-89]. He further testified that he contacted the manager of the Mission Valley Car Wash, Mr. Esquilera, who stated appellant had been laid off for lack of work and employees were prohibited from bringing in their own cars [C.T.89]. Ellis further testified there was a Minuteman Car Wash there also [C.T.89-90].

On surrebuttal Mr. Rodriguez testified he was the manager of the polish section as distinguished from the car wash section; that the policy had been changed with respect to use of the facilities but nevertheless workers could use them; that appellant had not worked there for two or three months but was permitted now and then to take cars there to work on his own [C.T.92-94].

V

ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION.

The appellant contends that the evidence was insufficient to enable a reasonable determination that it excluded the hypothesis of innocent importation. He relies particularly upon the Davis case (Davis v. United States, No. 21,354, ___ F.2d ___ 9th Cir., August 17, 1967) which differs from this case in that the contraband was found later in a sheriff's vehicle rather than in an importing car, and yet completely ignores much more similar cases such as Aguilar v. United States, 363 F.2d 379 (9th Cir.1966) and Eason v. United States, 281 F.2d 818 (9th Cir.1960).

Aguilar is almost identical with the case at bar. There the defendant drove another's car which had 98 pounds of marihuana secreted therein. Aguilar testified he had no knowledge of the contraband. The appellate court stated there was no direct evidence or admission of knowledge. The court rejected Aguilar's attack on the sufficiency of the evidence and asserted the trial judge was entitled to believe Aguilar's story "fishy" and

t draw affirmative inferences of knowledge.

Eason is even more favorable to the government, for there even the passenger as well as the driver was convicted in the face of their denials of knowledge and the fact they established the possibility that the contraband could have been secreted by others without the knowledge of the appellants. In that case appellants each asserted not only the hypothesis that some stranger could have secreted the contraband without appellant's knowledge, but also the hypothesis that the other appellant had possession. The court made short shrift of the very argument appellant makes here by stating:

"As for the alternative theory, there is no doubt that the narcotics could have been secreted in appellants' car by some stranger without their knowledge. The question, however, is whether minds of reasonable men might differ as to the reasonableness of this theory. We cannot say in this case that the theory that the narcotics were secreted by a stranger is so patently reasonable as to warrant our ruling as a matter of law that an inference of knowledge was not available from the facts of the case. We conclude that it was proper to leave this determination to the jury and that its judgment will not be disturbed."

Eason v. United States, 281 F.2d 818 (9th Cir.1960) at p. 821.

Appellant argues (p.11 his brief) that the hypothesis of innocence here is far more convincing than it was in Davis, but in so asserting he

evidences a misconstruction of that case. Davis was not found in possession of the contraband, here the appellant was. In Davis there not only had to be an inference of knowledge but also of possession -- an inference upon an inference. Davis never had exclusive dominion and control of the car in which the contraband was found, but appellant here did. As this court has stated in Eans v. United States, 257 F.2d 121 (9th Cir.1958) at p.128:

"Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found, is a potent circumstance tending to prove knowledge of the presence of such narcotics, and control thereof."

In the case at bar, as in the Eason case cited supra, the appellant appeared nervous to the primary inspector. Certainly that fact, particularly when taken in conjunction with the great value of the merchandise, appellant's failure to give "Roberto's" last name or more definitive information about him to the officers, plus the fact that there are car cleaning establishments in Tuana should entitle the jury, as the judge in the Aguilar case supra, to believe appellant's story "fishy" and to thereby draw an affirmative inference as to knowledge. To rule otherwise would be to make this court, which does not have an opportunity to observe the witnesses and thereby judge their credibility except from the cold record, trier of the facts.

The government submits that the record in this case shows ample evidence to support appellant's conviction and that there was not "plain

error" either as to the court allowing the matter to go to the jury or as to the jury's finding of guilt.

B. APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS TRIAL COUNSEL'S FAILURE TO MAKE A MOTION FOR JUDGMENT OF ACQUITTAL, TO OBJECT TO CERTAIN HEARSAY, OR TO TAKE OTHER STEPS DESIGNATED AS AN AFTER THOUGHT BY APPELLATE COUNSEL DO NOT CONSTITUTE PLAIN ERROR.

Appellant in effect argues that his trial counsel was so incompetent or inefficient as to make the trial a farce or a mockery of justice. In so doing he carries a heavy burden (Reid v. United States, 334 F.2d 915, 9th Cir.1964 at p.919), for not only is there a presumption of competency of counsel (Achtien v. Dowd, 117 F.2d 989, 992, 7th Cir.1941), but the trial judge, The Honorable Dennis F. Donovan, who alone had an opportunity to evaluate trial counsel's competency first hand, stated, "Well, gentlemen, the jury has retired, and I wish to compliment counsel for the government and counsel for the defendant in the splendid lawyer-like manner that they presented their case." [R.T.118-119, emphasis added].

Appellant argues that trial counsel's failure to move for judgment of acquittal constituted "plain error," yet government counsel and appellant counsel differ as to the import of the evidence in the record. Perhaps trial

counsel had read Aguilar and Eason, cited above, knew of the presumption in the statute (Title 21, United States Code, Section 176a)^{3/}, and decided a motion for judgment of acquittal was a useless act. Is he to be second guessed on the basis of Davis which wasn't decided until nearly seven months after this trial? If Davis does in fact overrule Aguilar and Eason was trial counsel incompetent for not having foreseen this? Or did such incompetency" or failure to move for judgment of acquittal make the trial farce or mockery of justice? The government submits that it did not. Certainly trial counsel should not have expected language in the only other case cited by appellant (Whaley v. United States, 362 F.2d 938,939, 9th Cir.1966), a perjury case unrelated to smuggling and not mentioning Aguilar or Eason, to have overruled them. Thus clearly there does not seem to be "plain error" with respect to trial counsel's failure to move for judgment of acquittal, and in view of the status of the cases at the time of trial, the court certainly didn't commit "plain error" in not granting acquittal on its own motion. And if there was not "plain error", then this court should not consider the sufficiency of the evidence (Foster v. United States, 318 F.2d 684,686, 9th Cir. 1963).

3/

"Whenever on trial for a violation of this subsection, the defendant is known to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." (Title 21 United States Code, 176a).

Appellant argues that his trial counsel's failure to object to Agent Ellis' hearsay testimony of the manager of the Mission Car Wash together with his failure to "take effective steps to clear up a state of complete confusion in the record as to the significance of the hearsay" made appellant's conviction a mockery of justice. The trouble with appellant's argument here is that defense counsel actually did take steps to clear up the matter, and, as was apparent to all present, there was no complete confusion in the record after he did so. As the record shows, and as appellant's counsel points out, all the witnesses concerned testified interchangeably with respect to the Mission and Minuteman Car Washes. Trial counsel for appellant first moved to clear up any ambiguity or cross-examination of Agent Ellis, who when asked if the Mission Car Wash was different from the Minuteman, answered, "I don't know. There is a Minuteman Car Wash there also." [R.T.90, emphasis added]. Trial counsel then proceeded to further clarify the matter by calling back his witness, Mr. Rodriguez, on surrebuttal. He testified that the Minuteman Car Wash is where "we polish," that "we've got one for the car wash and one for the polish," and that he was manager for the polish section [R.T.92]. It was obvious to those present that the Minuteman and Mission Car Washes were two separate parts of the same business, one for washing and one for polishing, and a careful reading of the record verifies this. Such are the problems of analyzing the cold record rather than live witnesses.

In any event, even assuming some confusion on this one point, was it of such a nature as to make the trial a farce or a mockery of justice? Do not all

trials, particularly under our rules of evidence, have some element of confusion? Trial counsel tried to clear up any confusion, but admittedly due to the necessity of working through a translator, this was difficult. Is he to be held incompetent because of his witnesses' language problems? He tried. What else should he have done? Should he have recalled the defendant and opened him up to further cross-examination with all its pitfalls? Or should he have recessed the trial to subpoena other witnesses, which would have, of course, also given the government more time to procure witnesses to prove the defendant a liar? These questions show the fallacy in "second guessing" or "Monday morning quarterback-backing" a trial attorney and indicate, certainly at least, that appellant has not carried his heavy burden of showing trial counsel so incompetent as to have made the trial a mockery of justice or a farce.

And even though trial counsel didn't object to clearly inadmissible hearsay, does this make him ineffective? Don't lawyers do this every day? As was said in Rivera v. United States, 318 F.2d 606,608 (9th Cir.1963),

"Assuming that counsel erred . . . in failing to object to the admission of evidence, more is required to constitute denial of the effective assistance of counsel guaranteed by the Sixth Amendment."

In any event it would appear that appellant has attached too much significance to the brief hearsay here involved. Appellant's own witnesses

clearly rebutted and explained it, or at the very least, created a conflict for the jury to decide. It is the government's view that it was the inherent "fishy" nature of appellant's whole story, rather than this brief hearsay which constituted the crucial factor in this case.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



MOBLEY M. MILAM

No. 21939 ✓

In the

United States Court of Appeals

For the Ninth Circuit

SONOCO PRODUCTS COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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SONOCO PRODUCTS COMPANY,

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Brief for Petitioner

JURISDICTIONAL STATEMENT

This is a petition by SONOCO PRODUCTS COMPANY ("Sonoco") from an order of the NATIONAL LABOR RELATIONS BOARD ("Board") finding Sonoco guilty of a refusal to bargain with certain unions (Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Warehouse, Processing and Allied Workers, Local No. 6, International Longshoremens' and Warehousemen's Union). This court has jurisdiction under Section 10 (f) of the National Labor Relations Act ("Act"), 29 U.S.C. sec. 160 (f).

STATEMENT OF THE CASE

The unions filed petitions seeking to represent, in either distinct units or jointly, the production, maintenance, truck drivers and driver helpers employed in Sonoco's plant in Hayward, California (R. 4, 5). Separate representation was resisted by Sonoco and, after a hearing, the Regional Director for the 20th region of the Board found a single unit to be appropriate and directed that an election be held therein (R. 5).

This election was held on March 23, 1966, and resulted in a vote of seventeen to thirteen against representation by the unions (R. 7). To this result the unions filed objections (R. 8). On the day prior to the election three speeches had been made by employer representatives to the employees (R. 15, first paragraph). The unions objected to these speeches on the grounds that they stated that the union's demands had forced other companies out of business and contained an implied threat to close the Sonoco plant (R. 8).

The Regional Director caused an ex parte administrative investigation to be made into these objections. Though the company contended a hearing should be held on the objections, it cooperated by obtaining copies of the speeches and furnishing them to the investigating agent on the latter's express promise that Sonoco would be given an opportunity to explain its position and contentions at a formal hearing before any decision was issued (R. 18). Nevertheless the Regional Director rendered a decision based solely upon the ex parte investigation, overturning the election and directing a new one (R. 11). This decision extracted portions of two paragraphs from one of the Sonoco speeches and held that the attempt made therein to explain why the regular annual increase in benefits could not be implemented

during the organizational campaign constituted illegal interference (R. 13, 14). The company's discussion of its benefit policy had not been among the portions of the speeches objected to by the unions (R. 8).

The company sought a review of this decision from the Board, complaining of the Regional Director's failure to consider the overall content and impact of all of the speeches and his refusal to afford the promised hearing (R. 17). This request for review was denied by the Board (R. 33).

On August 17, 1966, the second election was held, this time resulting in a vote of 16 to 14 in favor of the unions with one ballot being challenged (R. 34). The company filed objections to this election asserting that by threats and other conduct the unions had interfered with the employees' free choice (R. 35). Specifically, the company complained that threats of physical harm had been made to one employee and followed up by subsequent telephone calls, that another had been told that he would lose his job if the union were not voted in, and that on the day of the election a union organizer was present at the plant and spoke with some of the employees (R. 42, at 44-46; R. 49, at 52-54; R. 82, at 85-86 and 88-94).

Again the Regional Director caused an ex parte investigation to be made into the objections. In support of its contentions, Sonoco submitted to the investigator a signed statement by the employee threatened with physical harm and testimony by its plant manager concerning his observations and statements made to him by the employees involved (R. 88-93). However, no hearing on these matters was conducted; instead the Regional Director, on the basis of his ex parte investigation, concluded that the threat of bodily harm was legally immaterial, that no threat was con-

tained in the subsequent telephone calls, that the unions had not told an employee that he had better vote for them if he wanted to keep his job, and that the union organizer, assuming him to be such, did not speak with the employees on any matter related to the election (R. 42). So finding, the Regional Director affirmed the results of the election and certified the unions as the employees' bargaining representatives (R. 42).

The company again requested the Board to review the Regional Director's actions, claiming that it had submitted evidence which, if believed, would necessitate a setting aside of the election and that the Director was therefor required either to overturn the election, if he found the company's evidence to be uncontradicted, or to order a hearing if he found there to be conflicting evidence (R. 49). This request was also met by a telegraphic denial from the Board (R. 56).

Thereafter the unions filed a charge (R. 57, 58) and the Regional Director issued a Complaint and Notice of Hearing based thereon alleging that Sonoco had wrongfully refused to bargain after the second election (R. 59). The company answered denying the validity of the second election and alleging that the original election had been valid (R. 65).

At this juncture the Board's General Counsel interposed a motion for summary judgment, asserting that there was no issue of fact or law relevant to the unfair labor practice charge which required a hearing and that the company's refusal to bargain was established as a matter of law (R. 70). The Board transferred the case to itself and issued an order for the company to show cause why the General Counsel's motion should not be granted (R. 80), and thereupon the Regional Director withdrew the notice of hearing (R. 81). In response to the show cause order Sonoco reiter-

ated its various contentions, claiming that summary judgment was improper because there was insufficient basis in law or fact for the overturn of the first election, that the second election had been rife with interfering conduct by the unions and that a hearing, which to this point had been consistently denied, was necessary to resolve the various issues relative to the elections' validity *vel non* before the company could be found guilty of an unlawful refusal to bargain (R. 82).

These contentions were rejected by the Board which, without reviewing the content of either of the Regional Director's decisions, accepted them as conclusively establishing the invalidity of the first election and the validity of the second. The Board thereupon found that no hearing was required, summarily adjudged Sonoco guilty of an unfair labor practice and ordered it to bargain with the unions (R. 82).

From this order the instant appeal was taken (R. 105).

SPECIFICATION OF ERRORS RELIED UPON

1. In his *ex parte* decision overturning the results of the first election, without conducting a promised hearing, the Regional Director erred by extracting a small portion from one of three speeches made by employer representatives, considering that portion in isolation from the remainder of that and the other speeches, and attributing to that portion a narrow meaning which it could not reasonably bear.

2. The Regional Director erred in summarily overruling all the company's objections to the second election on the basis of his private investigation without affording the company a hearing on the substantial issues of law and fact that were raised by its objections.

3. By accepting the Regional Director's prior ex parte determinations as conclusive of the validity of each of the elections and entering a summary judgment predicated thereon, the Board deprived Petitioner of the hearing which both the Act and due process required be held on the issues underlying the unfair labor practice charge.

ARGUMENT

- I. In His Ex Parte Decision Overturning the Results of the First Election, Without Conducting a Promised Hearing, the Regional Director Erred by Extracting a Small Portion from One of Three Speeches Made by Employer Representatives, Considering That Portion in Isolation from the Remainder of That and the Other Speeches, and Attributing to That Portion a Narrow Meaning Which It Could Not Reasonably Bear.**

In his decision, reached after an ex parte investigation and without benefit of a hearing, the Regional Director singled out a minor portion of a speech made by Plant Manager Murry Hughes and held that the extracted remarks warranted an overturn of the first election.¹ We submit that the Regional Director's cryptic opinion places an interpretation upon Mr. Hughes' remarks which they cannot reasonably bear and in so doing violates the right of free speech guaranteed to the employer by the Constitution and Labor Act.

The practice of construing isolated segments of a speech without reference to the remainder of that speech or to the context in which the speech was made has been consistently disapproved by the Courts of Appeal and the Board. *E.g.*, *N.L.R.B. v. Ralph Printing and Lithographing Company*, 379 F. 2d 687 (8th Cir. 1967); *N.L.R.B. v. Her-*

1. The Regional Director's decision appears at page 11 of the Record.

man Wilson Lumber Company, 355 F.2d 426 (8th Cir. 1966); *N.L.R.B. v. Spartan Manufacturing Company*, 355 F.2d 523 (7th Cir. 1966); *Indiana Rayon Corporation v. N.L.R.B.*, 355 F.2d 535 (7th Cir. 1966); *N.L.R.B. v. J. Weingarten, Inc.*, 339 F.2d 498 (5th Cir. 1964); *Union Carbide Corporation v. N.L.R.B.*, 310 F.2d 844 (6th Cir. 1962); *Decorated Products, Inc.*, 140 N.L.R.B. 1383 (1963); *Arch Beverage Corporation*, 140 N.L.R.B. 1385 (1963); *The Lux Clock Manufacturing Company, Inc.*, 113 N.L.R.B. 1194 (1955). Reference to the entirety of the Hughes speech, especially that part immediately preceding the portion quoted by the Regional Director, shows the discussion to have been directed to Sonoco's *past* wage policy as bearing on the issue of whether anything could be gained by unionization (R. 15). The comment on the proposed benefits for the current year formed a natural part of this discussion by way of illustration and explanation.

Nor is this the end of it. On the day in question three talks were made to the employees.² The one by Mr. Hughes (the only one mentioned in the Regional Directors opinion) was immediately followed by one by Mr. Harrison Martin.³ Mr. Martin discussed the benefits so far made available to the employees and the fact that these were periodically reviewed and improved. These, he contended, were tangibles against which to weigh the promises of the union; and in this connection he addressed himself to the same matters which were found objectionable in the Hughes speech:

"Now let's consider whether you should believe what the company is telling or what the unions are telling you. I have already told you that I have known the people at Sonoco for a long time and I know that you

2. This fact, and the chronology of the speeches, are reflected in the first sentence of the Hughes' speech (R. 15).

3. Mr. Martin's speech is to be found at page 25 of the Record.

can believe what they say. They are fair and honest and, in my opinion, there is not a better organization anywhere. They enjoy a high reputation in the business world. You should know this yourself without my telling you. You know what the company has done in the past and you know what you can expect from them in the future. Just before we were approached by the union, we had already begun this year's discussions and review of wages and fringe benefits. We had plans for putting in a job evaluation system which is a means of establishing base rates on every job in the plant and deciding how much difference there should be in base rates for each job. This system is in effect at other Sonoco plants and is put in with the help of the employees. You would elect two people to represent you and management would appoint two people to represent them or the company and they would sit down and analyze these jobs and decide how much each one of them should be paid in relation to other jobs in the plant. We had also discussed an increase in wages but because of the union election, we could not proceed with this work or these changes. If we had done so, we would certainly have been accused of trying to buy your vote" (R. 29, 30).

When Mr. Hughes' comments are read against the background of the Martin speech, the conclusions (and underlying inferences) drawn by the Regional Director cannot be supported. The obvious purpose and import of the speeches was to answer union propaganda concerning benefits by pointing out that Sonoco had in the past and would continue in the future to furnish as much in the way of benefits as was economically feasible. The wage and job evaluation programs were cited by way of example of this fact and clearly not with any motive to announce "a previous intent to provide benefits" (R. 13). Certainly nothing was said which would remotely indicate to the employees that this

was other than a temporary moratorium, or that the company's benefit policy might be different after the election than before, depending upon the outcome.

Moreover, Sonoco had no reasonable alternative to the course it followed. Had it granted the increase in benefits while the organizing campaign was underway, it undoubtedly would have been charged with interfering conduct.⁴ See, e.g., *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405 (1964); *N.L.R.B. v. Laars Engineers, Inc.*, 332 F.2d 664 (9th Cir. 1964); *N.L.R.B. v. Ralph Printing & Lithographing Company*, 379 F.2d 687 (8th Cir. 1967); *Standard Coil Products, Inc.*, 99 N.L.R.B. 899 (1952). Nor could Sonoco have reasonably withheld the increase without explanation, as the discussion of the company's past and continuing benefit policy naturally raised a question as to why that policy was not being carried out at the present time. Indeed, to have followed this course might itself have been interpreted as an act of coercion or reprisal.⁵ Faced with this dilemma Sonoco could not reasonably avoid addressing itself to this issue; it did so by correctly observing that a grant of benefits in the context of an organizational campaign would expose it to a charge of bribery.

These comments by the company were well within its protected right of free speech. The Supreme Court in *N.L.R.B.*

4. That the organizational activity occurred at a time when wage increases were due is a fact which, while true, finds no official embodiment in the Record. By not mentioning it, the Regional Director avoids coming to terms with it in his opinion. For him to have questioned it would clearly have raised a substantial and material issue of fact requiring a hearing. As to the latter point see the discussion, *infra*, in parts II and III of the brief.

5. See *Valley Feed & Supply Company, Inc.*, 135 N.L.R.B. 778 (1962), where the Board implied that a failure to grant a regular increase might be unlawful. Consider the impact on the employees of a discussion of the employer's past wage policy which makes absolutely no mention of the benefits which the employees presently expect.

v. Exchange Parts Co., *supra*, noted the distinction between conduct (e.g., a grant of benefits) and commentary, the distinction being, of course, that the right of comment is guaranteed by the Constitution.⁶ To protect this right from infringement by the Board Congress enacted section 8(c), which assures the employer full latitude to express arguments and opinions which do not rise to the level of threats or promises of benefit.⁷ This right to comment is the right to meet union propaganda by explaining the employer's policies and pointing out the actual and potential disadvantages of unionization; that is, to attempt to persuade the employees that the better decision is to vote against the union. *E.g.*, *Thomas v. Collins*, 323 U.S. 516, 532 (1945); *N.L.R.B. v. Laars Engineers, Inc.*, 332 F.2d 664 (9th Cir. 1964); *N.L.R.B. v. Spartan Manufacturing Company*, 355 F.2d 523 (7th Cir. 1966); *Indiana Rayon Corporation v. N.L.R.B.*, 355 F.2d 535 (7th Cir. 1966); *N.L.R.B. v. Herman Wilson Lumber Company*, 355 F.2d 426 (8th Cir. 1966); *N.L.R.B. v. J. Weingarten, Inc.*, 339 F.2d 498 (5th Cir. 1964); *Union Carbide Corporation v. N.L.R.B.*, 310 F.2d 844 (6th Cir. 1962); *Bonwit Teller, Inc. v. N.L.R.B.*, 197 F.2d 640 (2nd Cir. 1952), *cert. den.* 345 U.S. 905 (1953); and see, *Decorated Products, Inc.*, 140 N.L.R.B. 1383 (1963); *Arch Beverage Corporation*, 140 N.L.R.B. 1385

6. In a footnote to its discussion the Court clearly indicated that words disassociated from conduct would raise an issue of free speech not present in its consideration of the employer's actual grant of benefits. 375 U.S. 405, 409, n.3.

7. See *N.L.R.B. v. Spartan Manufacturing Company*, 355 F.2d 523, 524 (7th Cir. 1966), concerning the reasons for the enactment of Section 8(c). The full text of section 8(c) of the National Labor Relations Act (29 U.S.C. sec. 158(c)), is as follows:

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

(1963); *The Lux Clock Manufacturing Company, Inc.*, 113 N.L.R.B. 1194 (1955).

Included within this area of free speech is the right to discuss the company's benefit policy and to comment upon that policy in comparison with that promised or elsewhere obtained by the union. *N.L.R.B. v. Laars Engineers, Inc.*, *supra*; *Arch Beverage Corporation*, *supra*; *Decorated Products Inc.*, *supra*. And this extends to a discussion of presently planned or due benefits and the necessity to defer them during the union organizational activity. *Bonwit Teller, Inc. v. N.L.R.B.* *supra*; *The Lux Clock Manufacturing Company Inc.*, *supra*; *Standard Coil Products Inc.*, *supra*; and *cf. Dayco Corporation v. N.L.R.B.*, 382 F.2d 577 (6th Cir. 1967).

Indeed, the *Bonwit Teller* case is one on all fours with the case at bar. In a speech to the employees, the employer, after noting its policy of periodically reviewing wages, stated that raises had been recommended, but these could not be put through before the election lest the company be accused of an unfair labor practice.⁸ The Board held that the "‘announcement of the pendency of wage increases . . . constituted a promise of benefit to the employees’" which interfered with their freedom of choice. The Board reasoned that it was immaterial that the company did not expressly condition the granting of the increase on the defeat of the union as the natural effect "‘of the announcement was to convince the employees that they did not need a union in order to obtain wage increases or other improvements in their conditions of employment.’" Rejecting the Board's construction, the Court held that the company's statements were nothing more than an explanation of why

8. This summary of the employer's speech, and the following discussion of the Board's holding, can be found in 197 F.2d at page 643.

the employees' right of semi-annual wage reviews had been stopped, and concluded:

"Under the circumstances we think that the communications of Rudolph to his employees went no further than to indicate that increases in pay would follow the ordinary practice of the employer and fell short of promising benefits to the employees if they should vote against the Union. Indeed, to forbid such communication would seem to prohibit all discussions between employer and employee of issues germane to the subject of unionization." 197 F.2d at 644.

This reasoning, and that in the other cases cited herein, is conclusive of the error in the Regional Director's decision. Viewed in their entire context, Sonoco's comments, including those which the Regional Director found objectionable, were clearly within the realm of persuasion, not coercion. They simply will not reasonably bear the narrow construction he placed upon them, nor could the employees have so understood them.⁹ The Courts have consistently resisted the Board's resort to such a "narrow and strained" construction to defeat the employer's right of legitimate comment. *N.L.R.B. v. Laars Engineers, Inc.*, 332 F.2d 664, 667 (9th Cir. 1964); *Union Carbide Corporation v. N.L.R.B.*, 310 F.2d 844, 845 (6th Cir. 1962); See also, *N.L.R.B. v. Sun Company of San Bernardino*, 215 F.2d 379 (9th Cir. 1954); *Dayco Corporation v. N.L.R.B.*, 382 F.2d 577 (6th Cir. 1967); *Indiana Rayon Corporation v. N.L.R.B.*, 355 F.2d 535 (7th Cir. 1966); *N.L.R.B. v. Herman Wilson Lumber Company*, 355 F.2d 426 (8th Cir. 1966). We submit the result should be the same in the instant case; the first election should be held to have been erroneously set aside.

9. It is interesting to note that neither were they so understood by the unions who did not, in their objections to the results of the election, include any objection to the company's comments on its benefit policies (R. 8).

II. The Regional Director Erred in Summarily Overruling All the Company's Objections to the Second Election on the Basis of His Private Investigation Without Affording the Company a Hearing on the Substantial Issues of Law and Fact That Were Raised by Its Objections.

Sonoco raised several objections to the second election, the primary ones being a threat of physical harm to one employee, a threat of loss of job to another, and the unauthorized presence of a union agent. Any *one* of these, if established, would have required an overturn of the election. These were investigated *ex parte* by the Regional Director and, without benefit of a hearing, summarily rejected in his decision (R. 42). This decision reflects a misapplication of legal standards and a misunderstanding as to what constitutes an issue of fact which must be resolved by a hearing.

Though not questioning that a substantial threat of harm was directed at an employee,¹⁰ nor that the threat was made in the presence of other employees,¹¹ the Regional Director nevertheless refused to consider the interfering nature of this conduct because "it occurred prior to the issuance of the Notice of Rerun Election" (R. 44). In so doing, the Regional Director acted directly contrary to the Board's decision in *The Singer Company*,¹² which held that the period for consideration of allegedly improper conduct

10. See: Employers Objections to Election, par. V. (R. 38); Employer's Request for Review (R. 52); affidavit of Murry K. Hughes (R. 88) and statement by Mr. Mendonea (R. 92). The Regional Director's discussion of these matters can be found at R. 44 and 45.

11. See R. 44, where the Regional Director states in his decision that "[a]ccording to the employees, three union agents approached the car and tore up the sign."

12. 161 N.L.R.B. No. 87, 1967 CCH NLRB para. 20,874, 63 LRRM 1381 (1966). This decision was based upon earlier rulings to the same effect in *Ideal Electric and Manufacturing Company*, 134 N.L.R.B. 1275 (1961), and *Goodyear Tire & Rubber Company*, 138 N.L.R.B. 453 (1962).

begins to run from the date of the first election and not from the date the second election is directed. This rule is bottomed on common sense as obviously the notice of a new election does not act as an eraser which wipes from the employees' minds all effects of prior illegal conduct. It has an especial pertinence in the instant case where the earlier threat was reinforced by subsequent telephone calls. Had the Regional Director correctly taken cognizance of the threat and found it to have in fact been made, an overturn of the election would have been required. *E.g.*, *N.L.R.B. v. Tampa Crown Distributors*, 272 F.2d 470 (5th Cir. 1959), *Progressive Mine Workers of America v. N.L.R.B.*, 187 F.2d 298, (7th Cir. 1951); *Gabriel Company Automotive Division*, 137 N.L.R.B. 1252 (1962); *National Gypsum Company*, 133 N.L.R.B. 1492 (1961); *Poinsett Lumber & Manufacturing Company*, 116 N.L.R.B. 1732 (1956); *Shipowners Association of the Pacific Coast*, 107 N.L.R.B. 1508 (1954); *G.H. Hess, Incorporated*, 82 N.L.R.B. 463 (1949).

The Regional Director's opinion continues with a discussion of the later telephone calls. From his private investigation the Regional Director purportedly found that the subsequent calls were "friendly" and did not constitute a threat (R. 45). Though he never discusses the mental state of mind of the threatened employee, his conclusion that there was no interference must be based upon the inference that the employee could not have been afraid. His reasoning was lent colorable support by ignoring the original threat which had been dismissed as legally irrelevant. This of course was error in light of *The Singer Company* case discussed above. And even apart from that case, it is contrary to both law and reason to consider acts in isolation from the context in which they take place or to ignore their combined effect, *i.e.*, in this case to treat the calls without consideration of the intimately related conduct which had preceded

them. *Cf. Home Town Foods, Inc. v. N.L.R.B.*, 379 F.2d 241 (5th Cir. 1967); *N.L.R.B. v. Trancoa Chemical Corp.*, 303 F.2d 456 (1st Cir. 1962).¹³

The Regional Director's inferential conclusion is, in addition, in direct conflict with evidence tendered by the company, to wit, the testimony of Mr. Hughes that Mr. Mendonca expressed fear over the later telephone calls. The Board's own rules require that a hearing be held whenever "substantial and material factual issues exist" concerning the objections to an election.¹⁴ Yet here the Regional Director took it upon himself to resolve a factual conflict, drawing an inference which necessarily discredited the employer's evidence. Furthermore, this inference was based upon an investigator's private interviews with the persons involved, whose names were not known to Petitioner and whose testimony, assuming it to have been as represented by the Regional Director, was not subject to investigation or cross-examination by Petitioner. Unless the existence of a substantial factual issue is to be determined solely by a prior *ex parte* weighing and crediting by the Regional Director, such an issue was surely presented here.¹⁵

13. See also the numerous cases cited on the total context rule, *supra*, at pages 6 and 7 of the brief.

14. N.L.R.B. Rules and Regulations, Series 8, as amended, Section 102.69(c). (29 C.F.R. sec. 102.69(c)). The text of this rule is set out in relevant part in Appendix A. This section of the brief is concerned with the Regional Director's unjustified refusal to order a hearing on the objections to the second election. The overall impact of the refusal to grant a hearing at any stage of the proceedings, from the overturn of the first election to the summary finding of an unfair labor practice, is the topic of the next section of the brief. The prejudicial effect of the refusal to afford a hearing on the results of the second election manifested itself in the subsequent bargaining order which was predicated upon the purported validity of the second election.

15. The presence of important factual issues is even clearer when it is considered that the Regional Director failed to take into account the existence, nature and circumstances of the threat itself.

Moreover, contrary to what the Regional Director's decision implies, the interfering nature of threats does not depend solely upon a detailed analysis of their effect on the employee (or employees) to whom they are directed. It has long been recognized that it is very difficult to measure the effect of such interfering conduct either on the person involved or on others who, as here, may have witness or learned of it. See, *e.g.*, *United States Rubber Co.*, 86 N.L.R.B. 3 (1949). Therefore, the standards against which challenged conduct is measured are in large part objective rather than subjective. Thus, for example, the fact that the threats do not have their desired effect does not render them any less objectionable. *Progressive Mine Workers of America v. N.L.R.B.*, 187 F.2d 298 (7th Cir. 1951); *G.H. Hess, Incorporated*, 82 N.L.R.B. 463 (1949). Nor is the fact that only one employee was threatened controlling (*National Gypsum Co.*, 133 N.L.R.B. 1492 (1961); *United States Rubber Co.*, *supra*), especially where, as in the instant case, the election takes place in a small plant with relatively few employees. *F. B. Rogers Silver Company*, 94 N.L.R.B. 205 (1951). In short, all the surrounding circumstances must be taken into account. *Cf.* *Poinsett Lumber & Manufacturing Company*, 116 N.L.R.B. 1732 (1956). These factors assume a greater than usual significance in this case where the outcome of the election turned upon *one* vote. But none of them were considered by the Regional Director, nor did he provide a hearing where the factual circumstances relevant to each could be developed.

The arbitrary refusal to afford a hearing was repeated as to the company's other objections. A union threat of loss of job such as that detailed in the Hughes affidavit (R. 89) would have required an overturn of the election.

Vickers Incorporated, Etc., 152 N.L.R.B. 793 (1965); *Caroline Poultry Farms Inc.*, 104 N.L.R.B. 255 (1953); and see, *Superior Wood Products, Inc.*, 145 N.L.R.B. 782 (1964). But the Hughes testimony was unilaterally rejected by the Regional Director in favor of the supposed denial of the coerced employee. The employer was given no opportunity to question the employee as to why his testimony had changed between the time he spoke with Mr. Hughes and his private interview with the Board agent, or to develop the relationship between the foreman and the employee or the other factual circumstances which would bear on what was said and its possible impact. Similarly, though the unauthorized presence and campaigning of a union organizer would have constituted vitiating interference (*Southwestern Electric Service Co. v. N.L.R.B.*, 194 F.2d 939 (5th Cir. 1952); *Gary Enterprises, Inc.*, 86 N.L.R.B. 431 (1949); *Continental Can Company*, 80 N.L.R.B. 785 (1948); *Detroit Creamery Co.*, 60 N.L.R.B. 178 (1945)), and though evidence was submitted that such was the case (R. 90, 91), the employer was refused a hearing in which to develop who was talked to and what was said.¹⁶

The Regional Director erred in each of the particulars outlined above. These errors, and the resulting prejudice, were rendered the more extreme by the closeness of the

16. On this latter issue the error was compounded by the application of an incorrect legal standard to the ex parte findings of fact. The strict laboratory conditions under which the Board insists elections be conducted is undermined by any conduct which is "reasonably calculated" to interfere with the employees' free choice. *American Tool Works of Hartford, Inc.*, 102 N.L.R.B. 1143, 1149 (1953). Interference is not dependent, as the Regional Director seemed to think, upon conduct which is so gross as to render free choice "impossible" (Regional Director's opinion at R. 46, first paragraph).

election which dictated that especial care be taken in scrutinizing the challenged conduct. Certainly the Director's conclusion that he had "found no evidence . . . which would warrant a hearing" (R. 46, n.2) cannot be supported. To borrow a phrase used by the Fifth Circuit when considering an almost identical situation:

"This treatment of the matter by the Regional Director would obviate the necessity of ever having a hearing on objections to an election. The disputed facts were resolved without testimony under oath, without cross-examination, and without the procedural safeguards of a hearing." *N.L.R.B. v. Lamar Electric Membership Corporation*, 362 F.2d 505, 508 (5th Cir. 1966).

We submit the company's objections to the second election were on sound ground legally and factually and should have resulted in the election being set aside.

III. By Accepting the Regional Director's Prior Ex Parte Determinations as Conclusive of the Validity of Each of the Elections and Entering a Summary Judgment Predicated Thereon, the Board Deprived Petitioner of the Hearing Which Both the Act and Due Process Required Be Held on the Issues Underlying the Unfair Labor Practice Charge.

After hearings on the objections to both the first and second elections had been denied, the Board, again refusing a hearing, entered a summary judgment finding Sonoco guilty of an unlawful refusal to bargain. Thus Petitioner found itself adjudged guilty of an unfair labor practice without ever having had the opportunity, in the context of a hearing, to present evidence and refute adverse evidence relative to the issues underlying that de-

termination. This, we contend, is contrary to both the Act and the most basic concepts of due process.

A. THE BOARD'S ERROR IN SIMPLE OUTLINE.

The post election procedures of the Board provide for an ex parte administrative investigation into challenged conduct and, when proper, a decision by the Regional Director predicated thereon.¹⁷ These procedures have been justified as necessary to expedite the representation issue and prevent dilatory tactics by unions and employers.¹⁸ *N.L.R.B. v. Joclin Manufacturing Company*, 314 F.2d 627 (2nd Cir. 1963); *N.L.R.B. v. O. K. Van Storage, Inc.*, 297 F.2d 74 (5th Cir. 1961). They prevent unnecessary delay and expense by permitting summary disposition of allegations which are patently without basis in fact. *N.L.R.B. v. O. K. Van Storage, Inc.*, *supra*. Similarly, they allow for a determination to be made without a hearing where even if all the facts contended for by the objecting party were true no grounds would be presented for setting aside the election. *N.L.R.B. v. Bata Shoe Company, Inc.*, 377 F.2d 821, 826 (4th Cir. 1967); *N.L.R.B. v. J. R Simplot Company*, 322 F.2d 170 (9th Cir. 1963). In such cases, unless addi-

17. N.L.R.B. Rules and Regulations, Series 8, as amended, Section 102.69(c). (29 C.F.R. sec. 102.69(c)). Relevant text of the Rule is set out in Appendix A.

18. For similar reasons no appeal lies from the affirmance of the results of an election or the direction of a new one. The employer can seek Court review of these rulings only on appeal from an unfair labor practice finding and order. See *N.L.R.B. v. Ortronix, Inc.*, 380 F.2d 737, 739 (5th Cir. 1967); *N.L.R.B. v. Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712, 715 (10th Cir. 1964).

tional evidence is tendered at the unfair labor practice proceedings, the total absence of factual issues make a hearing unnecessary at either the representation or unfair labor practice stages. *N.L.R.B. v. J. R. Simplot Company, supra*; *N.L.R.B. v. Bata Shoe Company, Inc., supra*; *NLR.B. v. Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712 (10th Cir. 1964).

However, these procedures offer opportunity for abuse by the Board and it has not infrequently applied them in a manner contrary to procedural due process. Too frequently they have been used, not to weed out the frivolous case, but merely to arrive at an ex parte disposition of cases for purposes of closing the files. Such a unilateral determination is of course no substitute for the hearing which must be held on the unfair labor practice charge,¹⁹ a fact of which the Courts have had increasing occasion to remind the Board. The practice of discounting the employer's offer of proof on the basis of conflicting evidence collected during an ex parte investigation cannot be squared with due process. *N.L.R.B. v. Bata Shoe Company, Inc.*, 377 F.2d 821 (4th Cir. 1967); *N.L.R.B. v. Capital Bakers, Inc.*, 351 F.2d 45 (3rd Cir. 1965); *N.L.R.B. v. Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712 (10th Cir. 1964); *N.L.R.B. v. Joclin Manufacturing Company*, 314 F.2d 627 (2nd Cir. 1963). Nor can matters of weight and credibility be determined except in the context of a hearing. *N.L.R.B. v. Capital Bakers, Inc. supra*; *N.L.R.B. v. Lord Baltimore Press, Inc.*, 300 F.2d 671 (4th Cir. 1962); *N.L.R.B. v. Dallas City Packing Co.*, 230 F.2d 708 (5th Cir. 1956). And where, as here, the employee's state of mind is a relevant issue,

19. Section 10(b) of the National Labor Relations Act. (29 U.S.C. sec. 160(b)) This section is set forth in toto in Appendix B.

there is a special need for the safeguards of a hearing. *Home Town Foods, Inc. v. N.L.R.B.*, 379 F.2d 241 (5th Cir. 1967); *N.L.R.B. v. Joclin Manufacturing Company*, *supra*.

This catalogue of "don'ts" is, in the instant case, an exact measure of what the Regional Director did.²⁰ After both elections he conducted private investigations and rendered an opinion based upon what those investigations purportedly revealed. The first election was reversed on grounds which, until it was presented with the *fait accompli* of the Regional Director's decision, the employer did not even know were being considered.²¹ The employer's objections to the second election, and the evidence submitted thereon, were discounted on the basis of supposed contradictory evidence revealed by the secret investigation. Yet at the unfair labor practice proceedings the Board held that, as the various issues underlying the objections to the two

20. In so doing he also acted in contravention of the Board's rules. See the discussion in II, *supra*, and Rule 102.69(c) cited therein at footnote 14.

21. This is a problem employers all too frequently face in these ex parte investigations. The Regional Director claims no responsibility to disclose either information obtained during his investigation or the course of that investigation. This is usually justified as necessary to protect the confidence of the employees who are privately interviewed by the investigating agent. While the latter is undoubtedly a legitimate consideration, petitioner doubts it affords a tenable basis for the Board's policy of refusing to apprise the employer to any extent of either the factors which the Regional Director is considering or non-confidential information claimed to have been uncovered. Certainly it cannot be justified where the Board later, without a hearing, predicates an unfair labor practice finding in part on an earlier determination which itself was based solely on the results of such a secret investigation. See *N.L.R.B. v. Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712 at 716 (10th Cir. 1964), for one Court's disapproval of this clandestine procedure as a substitute for an unfair labor practice hearing.

elections had been conclusively determined by the earlier ex parte procedures, it need not afford the company the hearing which the Act requires, and, so holding, it summarily found Sonoco guilty of an unlawful refusal to bargain.

In thus holding the Board clearly erred. The substantial issues surrounding the elections' validity did not drop from the scene merely because the Regional Director failed to acknowledge them. By routinely accepting the Director's unilateral pronouncements as conclusive, the Board perpetuated the error and deprived Petitioner of the hearing to which it was entitled under Section 10 of the Act. Such a foreclosure of a hearing has received unanimous judicial disapproval. The result has consistently been that which we contend should be reached here: The courts have declined to enforce the Board's Order and remanded for a hearing. *E.g.*, *N.L.R.B. v. Ortronix, Inc.*, 380 F.2d 737 (5th Cir. 1967); *Home Town Foods, Inc. v. N.L.R.B.*, 379 F.2d 241 (5th Cir. 1967); *N.L.R.B. v. Bata Shoe Company, Inc.*, 377 F.2d 821 (4th Cir. 1967); *N.L.R.B. v. Lamar Electric Membership Corporation*, 362 F.2d 505 (5th Cir. 1966); *N.L.R.B. v. Capital Bakers, Inc.*, 351 F.2d 45 (3rd Cir. 1965); *N.L.R.B. v. Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712 (10th Cir. 1964); *N.L.R.B. v. Joclin Manufacturing Company*, 314 F.2d 627 (2nd Cir. 1963); *N.L.R.B. v. Lord Baltimore Press, Inc.*, 300 F.2d 671 (4th Cir. 1962); *N.L.R.B. v. Dallas City Packing Company*, 230 F.2d 708 (5th Cir. 1956); *N.L.R.B. v. Poinsett Lumber and Manufacturing Company*, 221 F.2d 121 (4th Cir. 1955).²²

22. The *Poinsett Lumber and Manufacturing Company* saga affords a good example of the vice inherent in the Board's ex parte procedures. After the election, which it lost, the employer filed objections complaining of physical and economic threats directed at the employees. The Regional Director conducted a private in-

B. A CRITIQUE OF THE BOARD'S USE OF THE SUMMARY JUDGMENT DEVICE.

The starting point for this discussion is the hearing which, in Section 10(b), Congress has specifically provided must be held on the unfair labor practice charge.²³ This hearing is governed by the provisions of the Administrative Procedure Act (5 U.S.C. sec. 1001, *et seq.*), which in turn were enacted to ensure that the requisites of procedural due process would be applied by government agencies. To paraphrase Professor Davis, the key to the hearing thus provided for is the opportunity of each party to know and to meet the evidence and the argument on the other side, and this includes the opportunity to present evidence and argument and to cross-examine opposing witnesses. 1 Davis, *Administrative Law*, sec. 7.01, p. 407 (1958). To similar effect is the statement of the Court of Appeals for the Fourth Circuit that to satisfy the requirements of due process the objecting party must be "given the opportunity to be heard, to call and cross-examine those who are the source of Board evidence, and to present pertinent evidence of its

vestigation and issued a report concluding that the objections were "without merit". The Board adopted this report and dismissed the objections as raising no substantial issue. 107 N.L.R.B. 234. The employer refused to bargain, and at the subsequent unfair labor practice hearing again sought to be heard on the issues underlying its objections. However, the trial examiner refused to receive any evidence relating to these threats, holding the prior proceeding to be conclusive of the objections' lack of merit. The Board adopted the trial examiner's decision and ordered the company to bargain. 109 N.L.R.B. 1079. On appeal from this order, the Court held that the refusal at all stages to provide the company with a hearing was error and remanded accordingly. At the ensuing hearing, and in the Board's decision predicated thereon, it was found that the claimed threats had indeed been made and that as a result the election had been conducted in such "an atmosphere of fear and reprisal" that it should be set aside. 116 N.L.R.B. 1732, 1739.

23. National Labor Relations Act, Section 10(b). (29 U.S.C. sec. 160(b)) See Appendix B for text.

own." *N.L.R.B. v. Bata Shoe Company, Inc.*, 377 F.2d 821, 826-27 (4th Cir. 1967).

Of course no such hearing was held here. According to the Board's rationale, none was required because the Regional Director had considered and rejected Sonoco's contentions with respect to each of the elections and therefore, concluded the Board: "there are no issues of fact or law which require a hearing. Thus, as all material issues have been decided by the Board in accordance with the allegations in the complaint, the General Counsel's Motion for Summary Judgment is granted." (Decision of the Board, R. 96 at page 4). This being the Board's reasoning, it is fruitful to compare the manner in which "all material issues" were "decided" in this case with the normal situation where the summary judgment device is applied. To do so is to demonstrate that the procedures employed by the Board in the instant case made a mockery of the due process hearing requirements described by the above authorities.

It is axiomatic that courts approach summary judgment motions with great caution. As the procedure may deprive a party of his right to a trial, it is bounded by the strictest safeguards. The most basic tenet is that such a motion can be granted only if "there is no genuine issue as to *any* material fact." *New and Used Auto Sales, Inc. v. Hansen*, 245 F.2d 951, 953 (9th Cir. 1957) (emphasis added). The moving party has the burden of proof and this burden is a heavy one. All inferences of fact are to be drawn against him and in favor of the other party. *Griffeth v. Utah Power and Light Company*, 226 F.2d 661 (9th Cir. 1955); 6 Moore, *Federal Practice*, sec. 56.15(3), pp. 2335, 2337 (1966). Any doubt, no matter how slight, as to whether there is an issue of fact must be resolved against the moving party and in favor of a trial. *United States v. Farmers Mutual Insurance Association of Kiron, Iowa*, 288 F.2d 560, 562 (8th Cir.

1961); *Doehler Metal Furniture Company v. United States*, 140 F.2d 130, 135 (2nd Cir. 1945). Of course matters of weight and credibility can never be considered but must be left to the safeguards of trial procedures, *e.g.*, cross examination. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944). Moreover, a large variety of materials, ranging from the pleadings themselves to oral testimony, can be resorted to in determining whether any issue of fact remains in dispute. See generally, 6 Moore, *supra*, sec. 56.1(1), p. 2143. Finally, the motion is subject to argument before the court, where counsel are able to call attention to facts and factual inferences which may pose a conflict, and to relevant principles of law which would render these conflicts material.

These safeguarding principles contrast sharply with the lax standards attending the Board's post election procedures. The Regional Director causes his own investigation to be made into the objections. The burden of proof falls to the objecting party who is not necessarily the one who later moves for summary judgment.²⁴ During the investigation private interviews are conducted the results of which are not disclosed to the objecting party, who thus has no opportunity to refute any evidence thereby purportedly obtained. No one is privy to this evidence except the Regional Director and seldom does he spell it out in his decisions: witness the decisions in the instant case. Moreover, the Regional Director assumes the freedom (demonstrated with respect to the first election in this case) to affirm or deny the validity of the election on any grounds, whether or not these were included in the objections formally lodged and whether or not the parties have been apprised of, and had

24. For example, the burden was on Petitioner, as the objecting party, to overturn the second election, yet it was on the receiving end of the summary judgment motion.

the opportunity to submit evidence concerning, these grounds.

Petitioner does not mean to suggest that the mechanism of summary judgment has absolutely no place in the unfair labor practice proceedings. If a hearing is held at the representation stage then clearly the Board need not, in the unfair labor practice case, relitigate issues which were decided at the prior hearing. *N.L.R.B. v. KVP Sutherland Paper Company*, 356 F.2d 671 (6th Cir. 1966). And, as this Court has recognized, if there is really no dispute as to the facts or if the Regional Director's determination is based upon the assumption that the employer's proffered evidence is true, then again a hearing need not be held. *N.L.R.B. v. J.R. Simplot Company*, 322 F.2d 170 (9th Cir. 1963); and see, *Producers Livestock Marketing Association v. United States*, 241 F.2d 192, 196 (10th Cir. 1957).

But such was not the situation here. Rather the company's factual contentions were dismissed upon the basis of contrary evidence obtained during a secret investigation. The company never, at any stage of the proceedings, had an opportunity to know and meet this adverse evidence, to cross-examine those who were its source, or to submit evidence of its own. This was the procedure by which the outcome of a close election was determined and by which the company was found guilty of a refusal to bargain. Clearly, no court would tolerate such procedure; and certain it is that no court would have granted summary judgment in the circumstances here present. We submit that the procedure is no less contrary to the precepts of due process when employed by the Board to deprive a party of the hearing to which it is entitled on an unfair labor practice charge. The Board's Order should be vacated. See *Kirby v. Shaw*, 358 F.2d 446 (9th Cir. 1966); *N.L.R.B. v. Bata Shoe Company, Inc.*, 377 F.2d 821 (4th Cir. 1967); *N.L.R.B. v. Ortronix*,

Inc., 380 F.2d 737 (5th Cir. 1967); *N.L.R.B. v. Ideal Laundry and Dry Cleaning Co.*, 330 F.2d 712 (10th Cir. 1964); *N.L.R.B. v. KVP Sutherland Paper Company*, 356 F.2d 671 (6th Cir. 1966); *N.L.R.B. v. Poinsett Lumber & Manufacturing*, 221 F.2d 121 (4th Cir. 1955).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should be entered vacating the Board's Order and either affirming the validity of the first election or remanding the case for a full hearing on all issues relevant to the unfair labor practice charge, including the validity *vel non* of each of the elections.

Respectfully submitted,

E. JUDGE ELDERKIN
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. JUDGE ELDERKIN

(Appendices Follow)





Appendix A

N.L.R.B. Rules & Regulations, Series 8, as amended, Section 102.69(c) (29 C.F.R. sec. 102.69(c)):

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both . . . If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to section 102.62(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director . . .

Appendix B

National Labor Relations Act, Section 10(b) (29 U.S.C. sec. 160(b)):

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

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United States Court of Appeals

FOR THE NINTH CIRCUIT

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review and Cross-Petition
for Enforcement of An Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

These proceedings are before the Court on a petition for review and a cross-petition for enforcement of a decision and order of the National Labor Relations Board finding petitioner, Sonoco Products Company ("Sonoco"), guilty of violating Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C.,

Sec. 151, *et seq.*). The Board's decision and order (R. 96-104)¹ are reported at 165 NLRB No. 68. The unfair labor practices were committed in Hayward, California, where petitioner is engaged in the manufacture of spiral paper tubing. This Court, therefore, has jurisdiction under Section 10(e) of the Act.

COUNTERSTATEMENT OF THE CASE

The Board found that petitioner's admitted refusal to bargain with the certified representative of its employees² violated Section 8(a)(5) and (1) of the Act (R. 70). In so ruling, the Board rejected petitioner's contentions that (1) the election proceedings upon which the Unions' certification rested were invalid and (2) the Company's objections to the election raised material factual issues which required a formal Board hearing. The evidence upon which the Board based its findings is summarized below.

¹ References to the formal documents reproduced as "Volume I, Pleadings" are designated "R."

² Two unions were certified as a joint representative of the unit employees: Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Warehouse, Processing and Allied Workers Local No. 6, International Longshoremen's and Warehousemen's Union.

A. The First Election

On March 23, 1966, the Board conducted a secret ballot election at Sonoco's Hayward plant as a result of the Unions' joint petition for representation. The Tally of Ballots showed 17 votes against Union representation and 13 votes for representation. The Unions filed timely objections, however, alleging, *inter alia*, that the Company had interfered with the conduct of a fair election because of the content of its speeches delivered to employees on the day prior to the election (R. 8-10). During the ensuing Board investigation, the Company furnished copies of these speeches. The speech delivered by Plant Manager Murry Hughes admittedly contained the following remarks (R. 13):

If this union organizational activity had not been started, you would now be enjoying even higher base rates and other fringe benefits. The Company was not able to grant these improvements, however, because of the union organizational drive. Those of you who have worked here for several years are surely aware of the fact that wages and fringe benefits have been increased every year without interruption since beginning the operation in Fremont in 1959. At the time of our increases in wages and fringe benefits last year, we had been losing large amounts of money and an increase at that time was really not justifiable, but an increase of 5¢ to 8¢ was granted anyhow. We granted this increase because of our faith in you and in the future of this plant. We cannot say at this time how much of an increase you would have already been granted this year if it were not for

the union activity, but it was certainly greater than what was granted last year.

Another program that we had initiated in your behalf before the union organizational activity began was a job evaluation program. I have letters in my office dating back to August 1965, concerning the establishment of this program. On January 10th, of this year, I wrote a letter to Harrison Martin telling him that we had completed writing job specifications and were ready to proceed with this program so that it could be tied in with our annual review of wages and fringe benefits. Again we were unable to proceed with this program, which would have been beneficial to you, because of the union organizational activity.

The Board's Regional Director issued a Supplemental Decision and Order setting aside the March election and directing that a new election be conducted. In the Regional Director's view, the quoted remarks by Plant Manager Hughes constituted an unwarranted attempt to blame the Unions for the Company's refusal to institute certain new benefits and thereby tended to interfere with the employees' exercise of a free choice (R. 13-14). The Regional Director did not decide whether Hughes' remarks constituted a violation of Section 8(a)(1) of the Act, nor did he consider whether the Company's refusal to grant benefits itself violated the Act.³

³ In view of his decision to conduct another election, the Regional Director also found it unnecessary to resolve certain factual issues disclosed by his investigation: *e.g.*, whether certain Company supervisors had coercively interrogated employees or threatened them with a plant closing in the event of unionization (R. 14, n. 5).

The Company requested Board review of the Regional Director's decision. In its Request (R. 17-24), the Company did not contend that there was any new relevant evidence that the Regional Director had failed to consider. Instead, the Company simply contended that Hughes' speech did not violate Section 8(a)(1) of the Act. The Board, finding "no substantial issues warranting review", denied the request for review on June 27, 1966 (R. 33).

B. The Second Election

A second election was held on August 17, 1966, and resulted in a majority of ballots being cast in favor of the Unions (16 for, 14 against, and 1 challenged) (R. 34).⁴ Sonoco filed timely objections complaining that the Unions had coerced and intimidated its employees and deprived them of a free and untrammelled choice in the election (R. 35-41). Among the specific objections there raised were three claims renewed here by the Company: (1) the claim that Union agents threatened employee Mendonca with physical harm on the day of the first election (R. 44); (2) the claim that employee Scroggins received a telephone call from a union agent, on the night before the second election, in which he was told that a certain Company supervisor was "out to get [him] fired" and that Scroggins had therefore "better vote for the Unions if he wanted to preserve [his] job" (R. 37-38); and (3) the claim that a Union organizer engaged in campaigning at the plant on the day of the second election (R. 45-46).

⁴ The one challenged ballot was cast by Danny Stewart, who had been active in the Union campaign. Stewart's eligibility to vote was challenged on the grounds that he had recently been promoted to the job of foreman.

The Regional Director, after conducting an investigation, concluded that none of these claims warranted invalidating the second election (R. 46). Furthermore, he found, there were no conflicts in the evidence disclosed which would warrant a formal evidentiary hearing (R. 46, n. 2). Accordingly, he denied the Company's request for a hearing, overruled the objections in their entirety, and issued a certification of the Unions as exclusive bargaining representative (R. 46).

Thus, with respect to the first objection, relating to employee Mendonca, the investigation disclosed that the incident referred to by the Company occurred prior to the first election. Pursuant to Board policy, the Regional Director concluded that the incident was too remote in time to warrant invalidating the second election (R. 44). The Company did not dispute that the incident in question occurred prior to the first election.

With respect to the second objection, relating to employee Scroggins, the investigation disclosed that Scroggins had been told by a Union agent that a certain Company foreman was "set against him" and that, in fact, this foreman had complained about Scroggins to other employees. There was no evidence that the Union had substantially misrepresented the foreman's attitude. Accordingly, whether or not Scroggins was urged to vote for the Union in order to preserve his job — Scroggins denied being told this — the objection was deemed without merit (R. 45). The Company submitted no evidence regarding the foreman's attitude.

Finally, with respect to the Company's complaint that a Union organizer engaged in "electioneering" at the polls on the day of the second election, the investigation showed that Ray Gonzalez, a former Company employee, was driven to the plant that day. He was met immediately

at the employee entrance by a management official, before he could reach the polls, and asked to leave the premises. Gonzalez did leave, without speaking to employees, except to ask one of them for a ride off the property. Since the undisputed evidence showed that Gonzalez was not near the polls and did no campaigning, the Regional Director found it unnecessary to determine whether Gonzalez was a Union agent (R. 46). The Company submitted no evidence tending to show that Gonzalez might have reached the polling area or that he ever discussed campaign matters with any employee.⁵

The Company filed a Request for Review of the Regional Director's Decision (R. 48-55), arguing that there was a conflict in the evidence which required a hearing, or, if the factual claims of the Company be accepted as true, that the election must be deemed invalid. The Board denied the Request on November 14, 1966 (R. 56).⁶

⁵ The Company submitted other specific objections as well, but they were also overruled by the Regional Director and have not been renewed here.

⁶ In support of its Request for Review, the Company directed the Board's attention to an affidavit of Murry Hughes, plant manager, which it had submitted to the Regional Director. The Company also claimed that it was ready to prove a number of critical factual assertions: e.g., that employee Mendonca "changed his vote" because of union "threats", that Ray Gonzalez "talked to several employees at a time while they were waiting in line to vote" (R. 53). Hughes' affidavit, however, did not support these factual assertions, and the Company submitted no other evidence in support of its claims.

C. The Unfair Labor Practice Proceedings

After being certified, the Unions repeatedly requested the Company to bargain but their requests were denied (R. 76-79). Acting upon Union charges, the Board's General Counsel issued a complaint alleging Section 8(a)(5) and (1) violations (R. 59-62). In its answer, the Company admitted its refusal to bargain but challenged the propriety of the representation proceedings (R. 65-68). The General Counsel thereupon filed a motion for summary judgment with the Board on the grounds that there were no issues of fact or law requiring a hearing (R. 79).

On April 11, 1967, the Board issued an order transferring the matter to the Board and requiring the Company to show cause why the motion for summary judgment should not be granted. Company counsel filed a response to this order which asserted that there were "substantial factual issues" which required a formal hearing. Specifically, counsel alleged that he was ready to prove certain "facts" which would demonstrate the invalidity of the second election. In describing these "facts", counsel reiterated the assertions already made to the Regional Director; again, Hughes' affidavit and an attached statement — which did not support the assertions of counsel — was the sole evidence submitted by the Company in support of its offers of proof.

For example, in opposing the motion for summary judgment, Company counsel asserted a readiness to prove that employee Mendonca had told plant manager Hughes that he (Mendonca) had changed his vote solely because of Union threats of physical harm (R. 86). Hughes' own affidavit, however, states otherwise: Mendonca had told Hughes prior to the second election, that "the [Union] matter had been cleared up and that he was no longer afraid" (R. 88-

89). Again, counsel offered to prove that "Mr. Gonzalez talked to employees" while they were waiting to vote in the second election (R. 86). Hughes' affidavit, however, states otherwise: according to Hughes, Gonzalez was stopped at the entrance to the plant and denied access. Nothing in the affidavit conflicts with the Regional Director's finding that Gonzalez engaged in no campaigning near the polls (R. 90). Finally, counsel also offered to prove that the Union organizer made "totally false" statements when he told employee Scroggins that a Company foreman wanted to have Scroggins fired (R. 86). But the Hughes affidavit contains no testimony relating the foreman's true attitude, and there was no other evidence submitted by the Company to conflict with the Regional Director's finding on this point.

The Board, therefore, rejected the Company's argument that its objections to the second election raised issues of fact which required a formal hearing (R. 98). Further, the Board noted, all the contentions relied upon in opposition to the motion for summary judgment had previously been considered and found lacking in merit during the representation proceedings (R. 99). Since the Company did not present any newly-discovered evidence in support of these contentions, the Board affirmed its own prior rulings and granted the motion for summary judgment (R. 99). The Board concluded that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act, and ordered the Company to bargain with the Union and post a remedial notice (R. 100-103).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY'S REFUSAL TO RECOGNIZE AND BARGAIN WITH THE CERTIFIED UNIONS VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT

- A. The Board reasonably exercised its discretion in concluding that the first election should be set aside

Settled law affords the Board a wide area of discretion in deciding whether to set aside an election because of the impact on the electorate of surrounding circumstances.

Whether to set aside an election because of incidents during the campaign period is a matter for the sound discretion of the Board. As has been frequently remarked: * * * 'Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.' *N.L.R.B. v. Waterman Steamship Corp.*, 309 U. S. 206, 226 . . .; *N.L.R.B. v. A. J. Tower Co.*, 329 U. S. 324, 330 . . . *Rockwell Mfg. Co., Kearney Div. v. N.L.R.B.*, 330 F.2d 795, 796 (C.A. 7), cert. denied, 379 U. S. 890.

Accord: *N.L.R.B. v. Howell Chevrolet Co.*, 204 F.2d 79, 86 (C.A. 9), affirmed, 346 U. S. 482; *Foreman & Clark, Inc. v. N.L.R.B.*, 215 F.2d 396, 409 (C.A. 9), cert. denied, 348 U. S. 887; *Department & Specialty Store Emp. Union, Local 1265, RCL v. Brown*, 284 F.2d 619, 627 (C.A. 9), cert. denied, 366 U. S. 934. The only question for the courts is

whether the Board reasonably exercised its discretion. *N.L.R.B. v. J. R. Simplot Company*, 322 F.2d 170, 172 (C.A. 9); *International Tel. & Tel. v. N.L.R.B.*, 294 F.2d 393, 395 (C.A. 9); *Neuhoff Brothers Packers, Inc. v. N.L.R.B.*, 362 F.2d 611, 614 (C.A. 5), cert. denied, 386 U. S. 956; *Olson Rug Company v. N.L.R.B.*, 260 F.2d 255, 256 (C.A. 7); *Surprenant Mfg. Co. v. Alpert*, 318 F.2d 396, 399 (C.A. 1).

On the record in this case, it can hardly be questioned that the Company's conduct, prior to the first election, jeopardized the opportunity for an untrammelled expression of employee sentiment. Just before that election, Company officials delivered a series of speeches to the employees in which the employees were admittedly urged to reject the Unions. The Company supported its arguments by telling the employees that they would have already received a wage increase and other benefits had it not been for the union organizing campaign (*supra*, pp. 3-4).

In the Board's view, these remarks interfered with the conduct of a fair election by unjustifiably blaming the Unions for a loss of potential improvements in working conditions. It was the Company's decision — not the Unions' — that resulted in withholding the employment benefits; by blaming the Unions, however, the Company undermined the Unions' sought-for status as an effective representative and characterized it, falsely, as a detriment to the employees. In similar situations, the Board has previously decided to set aside elections because of the likelihood that the employer's conduct prejudiced the opportunity for a fair election. See, e.g., *Foreman & Clark, Inc.*, *supra*; *Brandenburg Telephone Co.*, 164 NLRB No. 26 (Trial Examiner's Decision, p. 28), *Cadillac Overall Supply Co.*, 148 NLRB 1133, 1135-36.

The Company argues that its remarks were within the realm of "persuasion" and "legitimate comment" (Br., p. 12) but the authority cited for this proposition is plainly distinguishable. In none of those cases did the employer tell his employees that they were losing a benefit, which otherwise would have been granted, solely because of a union organizing campaign. Nor does the Company advance its case by accusing the Regional Director of relying upon a *segment* of Hughes' speech. The Board agrees, of course, as the Company argues, that words must be read in context. But there is simply nothing in any of the other portions of Hughes' speech, or indeed in any of the speeches by other Company officials, to modify or qualify the assertions by Hughes which prejudiced the first election. As petitioner's brief itself explains, the entirety of the speech merely indicates a discussion of "Sonoco's past wage policy as bearing on the issue of whether anything could be gained by unionization" (Br., p. 7). With this context, or without it, Hughes' prejudicial remarks remain prejudicial.

Petitioner also argues that the Company was faced with a "dilemma" which required explanation to the employees: if the Company withheld the increase in benefits, thereby changing its past practice, it would have faced unfair labor practice charges; on the other hand, granting the benefits during an organizing campaign would also have invited "a charge of bribery" (Br., p. 9). Therefore, petitioner asserts, it should be allowed to address itself to the issue and explain its policy to employees. But this "dilemma" is a spurious one. The law does not prohibit an employer either from granting benefits, or from refusing to grant benefits, merely because an organizing campaign is in progress. What the Act prohibits is conduct undertaken for the purpose of inducing employees to vote against the union. *N.L.R.B. v. Exchange Parts Co.*, 375 U. S. 405. Moreover, if the Company was interested in

explaining to employees that it was withholding benefits solely to discourage the filing of a meritless charge of unfair practices, it could readily have so stated. Instead, the Company asserted repeatedly that the reason for its decision was “union activity”, or “the union organizational activity.” Rather than communicating a legitimate — albeit tenuous — explanation, the Company thereby suggested that its motivation might have been the very one proscribed by the Act.⁷

⁷ As already noted, however, the Regional Director did not consider whether a Section 8(a)(1) violation had been committed, nor were Section 8(a)(1) charges ever filed with respect to Hughes' conduct. Accordingly, we need not reply to Petitioner's argument that this conduct was not prohibited by Section 8(a)(1) and that it was protected by Section 8(c). The Board is entitled to set aside an election because of conduct which does not necessarily constitute an unfair labor practice. And the employer's constitutional right of free speech, embodied in Section 8(c) of the Act, is not infringed when the Board so acts. *Foreman & Clark, Inc.*, *supra*, 215 F.2d at 408-409 (C.A. 9); *N.L.R.B. v. Shirlington Supermarkets, Inc.*, 224 F.2d 649, 652-653 (C.A. 4), *cert. denied*, 350 U.S. 914; *N.L.R.B. v. Clearfield Cheese Co.*, 322 F.2d 89, 92 (C.A. 3); *N.L.R.B. v. Tennessee Packers, Inc.*, 379 F.2d 172, 181 (C.A. 6); *Greenboro Hosiery Mills, Inc. v. Johnston*, ___ F.2d ___, ___ (C.A. 4) 65 LRRM 2299; *General Shoe Corp.*, 77 NLRB 124, 126.

- B. The Board reasonably exercised its discretion in concluding that the second election should not be set aside
-

In overruling the Company's objections to the second election, the Board and its Regional Director acted well within the scope of the broad authority vested by the Act. The Regional Director conducted an investigation into all the matters raised by the Company, and set forth the evidence and his findings in detail (*supra*, pp. 6-7). As we show in detail, *infra*, at pp. 16-20, none of the relevant facts were the subject of conflicting evidence; therefore, the sole question presented by the Company's objections was whether the incidents complained of warranted invalidating the election.

1. The Jack Mendonca incident. As shown, *supra*, p. 6, there was evidence that three union organizers had threatened Mendonca with a beating on the day of the first election because he appeared near Company premises with a sign bearing the legend "Better dead than red" (R. 44). The Regional Director assumed this to be true but concluded that the incident was too remote in time to constitute grounds for invalidating the second election. That judgment was plainly a reasonable one. The two elections were 5 months apart. Any coercive impact attributable to the Mendonca incident could hardly be presumed to linger so long, especially since the Board set the first election aside and advised the employees that they would have a later opportunity to register their sentiment freely and without fear of reprisal. In disputing the Regional Director's judgment that a 5 month hiatus would suffice to dissipate any lingering effects of the March 23 incident, the Company plainly errs.

As the Company points out (Br., p. 13), the Board's current policy in re-run election cases is to exclude consideration of conduct which occurs before the first election. *The Singer Co.*, 161 NLRB No. 87. The Regional Director had found that the threats to Mendonca were too remote because they occurred prior to the notice for a new election. The standard employed by the Regional Director was apparently erroneous, but the error was harmless since the conduct in question occurred before the first election.⁸

The Regional Director's investigation also disclosed that Mendonca's relatives subsequently received telephone calls from a union agent. But no basis for setting aside the election emerges from this evidence, either. Mendonca's relatives and the union agent were personal friends; the agent was simply interested in learning Mendonca's objections to the Union; and Mendonca himself subsequently telephoned the Union agent and engaged in peaceful discussions with him (R. 45). Even the affidavit submitted by the Company's own witness conceded that Mendonca had announced, prior to the second election, "that the matter had been cleared up and that he was no longer afraid" (R. 88-89).

⁸ The *Singer* case, which clarified the appropriate cut-off date for such cases, did not issue until after the Regional Director's decision in this case. Petitioner did not complain to the Board about the matter and, since the Mendonca incident was obviously too remote under either test, such a complaint would have been pointless.

2. The Gonzalez "electioneering" charge. The Regional director's investigation and the Hughes affidavit disclosed that Gonzalez had been turned away from the plant at the entrance, never reached the polls, and engaged in no discussion with employees (*supra*, pp. 6-7). In these circumstances, there is obviously no basis in logic or precedent for invalidating the election. *N.L.R.B. v. Moyer & Pratt, Inc.*, 208 F.2d 624 (C.A. 2); *N.L.R.B. v. Carolina Natural Gas Corp.*, __ F.2d __, 67 LRRM 2006, 2009 (C.A. 4).

3. The Scroggins incident. The investigation disclosed that employee Scroggins received a telephone call prior to the second election, was told by a union agent that a certain Company foreman was "set against him", and was asked if he was going to support the Union. There was a conflict in the evidence about whether the union agent told Scroggins that he had better vote for the Union in order to save his job; Scroggins denied being told this (R. 45). But the conflict was immaterial, since there was no evidence that the Union had misrepresented the foreman's attitude toward Scroggins. In any event, there would plainly be nothing improper about a union promise to protect an employee against a discharge motivated by personal dislike.

C. The Board was not required to conduct a formal hearing because the material facts were not in dispute

Neither the National Labor Relations Act nor the Administrative Procedure Act, 5 U.S.C., Sec. 554(a)(6)(Supp.II), provides a procedure for the resolution of post-election

objections.⁹ The Board's Rules and Regulations, Series 8, Section 102.69(c), 29 C.F.R. Sec. 102.69(c) provide, however, that a hearing will be held on election objections where there are "substantial and material factual issues . . . which can be resolved only after a hearing."

The burden rests upon the party seeking a hearing to establish that "substantial and material" issues do exist which require a hearing for their resolution — he must point to specific evidence which has a basis in law for overturning an election which otherwise is presumed to have been valid. *N.L.R.B. v. Mattison Machine Works, Inc.*, 365 U.S. 123, 124; *N.L.R.B. v. Carolina Natural Gas Corp.*, ___ F. 2d ___, 67 LRRM 2006 (C.A. 4); *N.L.R.B. v. J. R. Simplot Co.*, 322 F. 2d at 172 (C.A. 9); *N.L.R.B. v. National Survey Service, Inc.*, 361 F. 2d 199, 207-208 (C.A. 7); *N.L.R.B. v. Tennessee Packers, Inc.*, 379 F. 2d 172 (C.A. 6); *Rockwell Mfg. Co. v. N.L.R.B.*, 330 F. 2d at 797 (C.A. 7). The reasons for this rule were cogently stated by this Court in *N.L.R.B. v. J. R. Simplot Co.*:

"The Board nonetheless makes it a practice to hold post-election hearings on objections to elections, but in keeping with the spirit of the Act *does so only when it appears that the allegations relied upon to overturn the election have a basis in law and there is evidence to support them.* The opportunity for protracted

⁹ *N.L.R.B. v. J. J. Collins*, 332 F. 2d 523, 524 (C. A. 7); *N.L.R.B. v. Joclin Mfg. Co.*, 314 F. 2d 627, 632 (C. A. 2).

delay of certification of representation elections which would exist in the absence of reasonable conditions to the allowance of a hearing on objections is apparent. An objecting party who fails to satisfy such condition has no cause for complaint when and if his demand for a hearing is denied.¹⁰

¹⁰ The Sixth Circuit, in the *Tennessee Packers* case, *supra*, echoed this language and summarized the criteria for determining what constitutes "substantial and material issues."

In order to raise "substantial and material factual issues," it is necessary for a party to do more than question the interpretation and inferences placed upon the facts by the Regional Directors. *N.L.R.B. v. National Survey Service, Inc.*, 361 F. 2d 199 (C. A. 7); *N.L.R.B. v. J. R. Simplot Company*, 322 F. 2d 170 (C.A. 9); *Macomb Pottery Company v. N.L.R.B.*, [376 F. 2d 450] No. 15675, decided April 18, 1967 (C.A. 7); *N.L.R.B. v. J. J. Collins' Sons, Inc.*, 332 F. 2d 523 (C. A. 7); *N.L.R.B. v. Sun Drug Co.*, 359 F. 2d 408 (C. A. 3). It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion. *N.L.R.B. v. National Survey Service, Inc.*, *supra*; *N.L.R.B. v. J. R. Simplot Company*, *supra*; *Macomb Pottery Company v. N.L.R.B.*, *supra*. Mere disagreement with the Regional Director's reasoning and conclusions do not raise "substantial and material factual issues." This is not to say that a party cannot except to the inferences and conclusions drawn by the Regional Director, but that such disagreement, in itself, cannot be the basis for demanding a hearing.

In this case, petitioner plainly failed to satisfy the prerequisite for a formal hearing: none of the evidence presented by the Company conflicted with the essential factual determinations made by the Regional Director. Thus, the Company has never come forward with any evidence to show that the Regional Director erred in finding that the Mendonca threat occurred on the day of the first election, five months remote from the election here sought to be invalidated.

Nor did the Company proffer any evidence tending to conflict with the Regional Director's findings that Gonzalez was stopped at the entrance to the plant and sent away without opportunity to engage in electioneering. To be sure, *petitioner's counsel*, in opposing summary judgment, *did offer to prove* that "Gonzalez talked to employees at a time while they were waiting in line to vote" (R. 86). But in support of that offer of proof, counsel submitted only an affidavit by the plant manager which clearly shows the contrary (R. 90), and fully supports the Regional Director's statement of facts. Unsupported allegations of counsel are hardly a sufficient basis for requiring a hearing. "Rather, as we have pointedly held, the 'objecting party must supply the Board with *specific evidence* which prima facie would warrant setting aside the election'" *N.L.R.B. v. Douglas County Electric Corp.*, 358 F. 2d 125, (C. A. 5). Accord: *Baumritter Corp. v. N.L.R.B.*, 386 F. 2d 117, (C. A. 1). Here, then, as in *Carolina Gas*, *supra*, ". . . the Company's allegations . . . appear to be no more than the dilatory maneuvers this screening device was designed to combat." 67 LRRM at 2009.

Likewise, no evidence was ever presented tending to conflict with the Regional Director's critical findings regarding the Scroggins episode. In his Request for Review, Company *counsel* asserted that the union agent spoke falsely when he warned Scroggins about a Company foreman's attitude (R. 86). But, again, the sole evidence proffered on this point by the Company, *i.e.*, the Hughes affidavit, contains nothing to support the lawyer's allegation. Accordingly, the Regional Director's finding that the union agent did not misrepresent Scroggins' status was never the subject of any evidentiary conflict warranting a hearing.

And since the Company raised no new issues or evidence during the unfair labor practice proceedings, but simply renewed the arguments already considered and rejected in the representation case, the Board was entitled to grant the General Counsel's motion for summary judgment. A party has no right to relitigate in the unfair labor practice case issues already litigated in the representation case. *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146; *N.L.R.B. v. Tennessee Packers, Inc.*, *supra*; *N.L.R.B. v. National Survey Service, Inc.*, *supra*; *Rockwell Mfg. Co. v. N.L.R.B.*, *supra*; *N.L.R.B. v. Clearfield Cheese Co.*, *supra*; *N.L.R.B. v. B. H. Hadley, Inc.*, 322 F. 2d 281 (C. A. 9).

Petitioner's criticism of the Board's summary judgment procedure requires no separate answer since, as petitioner concedes (Br. 19), the procedure is entirely appropriate in the absence of unresolved material factual issues. To the extent that petitioner buttresses his critique by reference to the general reluctance of federal district courts to

grant summary judgment, however, it seems appropriate to point out what petitioner has overlooked. First, district courts, unlike the Board, have no investigative machinery designed to provide an impartial independent factual inquiry. While the Board does not permit the administrative investigation to perform the function of resolving evidentiary conflicts, the investigation can, nonetheless, provide disclosure of matters which obviate the need for a hearing. For example, the investigation may provide an undisputed context or background which wholly dilutes any coercive effect inferable from the disputed incident itself. Second, much of the district court reluctance to grant summary judgment except in the clearest cases derives from the overriding nature of the constitutional right to a jury trial. No such overriding policy applies here. Indeed, Congress' expressed interest has been to eliminate time-consuming formal proceedings in these proceedings except where the complaining party clearly shows the need for a hearing. *N.L.R.B. v. Air Control Products of St. Petersburg, Inc.*, 335 F. 2d 245, 249 (C.A. 5); *N.L.R.B. v. Sun Drug Co.*, 359 F. 2d 408, 414 (C.A. 3); see also, *J. R. Simplot, supra*; and *Joclin Mfg. Co., supra*.

Perhaps the most obvious distinction between district court summary judgment and the Board's procedure is the allocation of the burden of proof. Under the Federal Rules (Rule 56), the burden is on the party moving for summary judgment to demonstrate that "there are no genuine issues of material fact." Cf., Wright, *Federal Courts* at 388. Before the Board, however, the burden rests on the party

seeking a hearing to show that there are “substantial and material factual issues” which can only be resolved by a hearing. *N.L.R.B. v. J. R. Simplot Co.*, *supra* and cases cited at p. 17.

In light of these important differences between the Board and the district courts, petitioner can hardly fault the Board for refusing to adopt all the nuances of district court practice and philosophy.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for review should be denied, and the Board’s cross-petition for enforcement should be granted.

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C E R T I F I C A T E

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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In the

United States Court of Appeals

For the Ninth Circuit

SONOCO PRODUCTS COMPANY,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Reply Brief for Petitioner

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Reply Brief for Petitioner

I. The Error in the Overturn of the First Election.

Petitioner does not dispute the "wide area of discretion" accompanying the Board's power to determine representation matters. However, the fact that this discretion is broad does not mean that it is unbounded, and it is these limits which concern us here. Thus the discretion must not be exercised unreasonably; it cannot be exercised in such manner as to exceed or conflict with the authority granted by Congress; nor can it be exercised in a way which infringes upon constitutionally protected rights. As discussed in petitioner's opening brief, the Board's treatment of the employer's comments is subject to attack on each of these grounds.

A. THE BOARD'S TREATMENT OF THE SPEECH WAS AN ABUSE OF DISCRETION.

In its brief,¹ the Board persists in isolating one segment of one speech and placing upon that segment a harsh and limited connotation. The simple fact remains, however, that the extracted words were part of an entire speech, and that speech was part of a series of speeches. The meaning conveyed by the isolated words cannot be assessed without consideration of the tenor and content of both the remainder of Hughes talk and the other speeches. It is the mandate of the law that the Board recognize the logic of this interrelationship. This it failed to do.

Among the cases cited in the Board's brief only one is remotely analogous to the instant case, and that is an unappealed decision by the Board itself. *Cadillac Overall Supply Co.*, 148 N.L.R.B. 1133 (1964) (Bd. Br., p. 11). However, the situation there presented was that of a company which had become overtly benefit conscious for the *first time* during an organizing campaign, simultaneously announcing an intent to grant a benefit and the necessity to withhold it during the union activity. Such behavior readily lends itself to the inference that the benefit was announced at this particular time merely to afford an opportunity to also announce the necessity that it be withheld "because of the union organizational activities."² In contrast, Sonoco had a settled policy of periodically reviewing and increasing benefits, and this was well known to the employees. The

1. References to the Board's brief are cited Bd. Br.

2. Whether the decision in the *Cadillac Overall Supply* case is consistent with Section 8(c) and with the constitutional guarantee of free speech is a question not pursued here. See the discussion in I. B., *infra*. The question would be a close one, but the company's timing of the announcement of the proposed insurance benefit might be taken as constituting a promise of benefit in violation of 8(c). The fact that Sonoco's benefit policy was a long standing one precludes a similar interpretation of its remarks.

company did nothing other than call attention to this policy, which it clearly had a right to do, and explain that circumstances prevented the policy's being carried out at the present time, an explanation which the circumstances demanded be made. There is nothing in this course of action to furnish grounds for the adverse motive inferred by the Regional Director.³

Significantly, the Board's brief shuffs over the Martin speech without comment. In this speech, made immediately subsequent to the one by Mr. Hughes, the company's wage policy and the present inability to increase benefits were explained in greater detail than in the Hughes' speech, and this was done in terms to which no objection was, or could have been taken. The adverse connotation which the Board seeks to fasten upon the isolated comments cannot by any

3. The Regional Director's opinion reflects the fact, well-known to all labor lawyers, that the company had one strike against it because it dared to mention benefits in the first place. From this it was an easy step for the Regional Director to isolate certain portions of this discussion and interpret them in a restrictive manner. Apart from the fact that the company's right to comment upon its past benefit policy is well settled, and cannot form the basis for an adverse inference, we also pointed out in our opening brief that the company had little choice but to follow the course it did, i.e. to not grant the usual benefits and explain why. Notwithstanding the Board's pooh-poohing of the problem (Bd. Br. pp. 12-13), the dilemma facing the employer in these cases is a very real one as is readily evident from a study of the Board decisions rendered since *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405 (1964). See, in addition to the cases discussed in petitioner's opening brief, the discussion and case citations in Bok, *Regulating NLRA Election Tactics*, 78 Harv. L. Rev. 38, 112 (1964), and Perl, *Granting of Benefits During a Representation Election: Validity of NLRB General Rule*, 18 Lab. Law Jour. No. 11, p. 643, (November, 1967). As a result of the muddle created by the Board's "heads I win tails you lose" approach, an employer cannot help but predicate his decision as to what to do about benefits in substantial part on the very grounds which supposedly are prohibited—the presence of a union on the scene—because that presence forces the employer to prophesize which of its overlapping approaches the Board will choose to apply to his case.

logic of language be said to have any viability in light of the extensive discussion by Mr. Martin. After the two speeches the employees could have been left with only one impression: that the company might violate the law by granting the usual benefits. It is arbitrary for the Board to pretend otherwise.

B. THE BOARD'S ACTION WAS IN VIOLATION OF 8(c) AND IN EXCESS OF ITS DELEGATED AUTHORITY.

It is enough to condemn the Board's manner of treating the company's statements to note, as above, that this treatment constituted an arbitrary abuse of discretion. However, the Board has raised a further line of argument which cannot be passed without comment. It contends that unless its actions are found to constitute such an abuse of discretion, the actions cannot be challenged because the Board is free to set aside an election solely upon the basis of employer comments which, while they could not form the basis for an unfair labor practice under 8(a)(1) or 8(c), the Board has nevertheless determined somehow interfered with the employee's free choice.⁴ In short, the Board's position is bottomed upon the assumption that at the election stage its authority to regulate employer speech is not limited by the provisions of 8(c),⁵ or by constitutional provisions of

4. Bd. Br., p. 13, n. 7. The Board refers to Mr. Hughes' "conduct", but it cannot by this semantic device alter the obvious fact that the election was overturned solely upon the basis of the *content* of the Hughes speech.

5. The text of 8(c) is set out in petitioner's opening brief at p. 10, n. 7. It should be noted that neither the Regional Director nor the Board has suggested that the objected to statement might qualify as a "threat" or "promise of benefit" under that section. It is, of course, apparent that the statements are neither. Their unobjectionable nature is well documented in the cases cited in our opening brief. See *Bonwit Teller, Inc. v. N.L.R.B.*, 197 F.2d 640 (2nd Cir. 1962) and the other cases cited on pages 10-12 of petitioner's opening brief.

analogous proportions, but extends to any speech which the Board, in its broad discretion, decides might interfere with its "laboratory conditions." So far as we are aware this contention has never received judicial sanction.⁶

The Board's contention can better be assessed by first recalling the background against which section 8(c) was enacted. The Board had adopted what Congress thought was an overly restrictive view towards the employer's right of speech during election campaigns. *N.L.R.B. v. Spartan Manufacturing Company*, 355 F.2d 523, 524 (7th Cir. 1966). The cases were replete with instances where the Board ordered the employer to cease and desist from making certain statements, almost to the point of imposing absolute neutrality upon the employer, and to correct this 8(c) was enacted "to recognize and define the rights of both employers and unions to free speech as guaranteed by the First Amendment." *N.L.R.B. v. TRW-Semiconductors, Inc.*, 385 F.2d 753, 755 (9th Cir. 1967). It was thought that the best guarantee of a free and informed choice by the employees was a healthy flow of information from each of the competing interests:

"The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of

6. As for the cases the Board cites in support of its proposition: One involved a threatening speech illegal even under 8(c). *N.L.R.B. v. Clearfield Cheese Co.*, 322 F.2d 89 (3rd Cir. 1963). Another did not involve speech at all, but an actual grant of benefits. *N.L.R.B. v. Tennessee Packers, Inc.*, 379 F.2d 172 (6th Cir. 1967). In a third the only issue involved was a limited one as to the jurisdiction of the federal district courts. *Greenboro Hosiery Mills, Inc. v. Johnston*, F.2d, 65 LRRM 2299 (4th Cir. 1967). And in the remaining two the question before the Courts was not whether the *content* of certain speeches was objectionable, but whether the employer engaged in interfering *conduct* by making a speech (regardless of its content) a very short time before the election. *Foreman & Clark, Inc. v. N.L.R.B.*, 215 F.2d 396 (9th Cir. 1954); *N.L.R.B. v. Shirlington Supermarkets Inc.*, 224 F.2d 649 (4th Cir. 1955).

the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available. It is an adversary proceeding and hardly impartial but there is a limit. We conclude that Congress set the limit in § 8(c) . . .” *Southwire Company v. N.L.R.B.*, 383 F.2d 235, 241 (5th Cir. 1967); quoted in substantial part in *N.L.R.B. v. TRW-Semiconductors, Inc.*, supra at 760.

Though the Board would have it otherwise, it is apparent that in the instant case it has acted contrary to both the spirit and the letter of this section. Here it voided an election *solely* upon the basis of certain employer statements which were well within the protected area of speech marked out by 8(c). It then found the employer guilty of an unfair labor practice because the employer refused to bargain on the grounds that the election was not rendered invalid by reason of the speech. In other words, though the employer’s speech was not itself declared to be an unfair labor practice, it formed the gravamen for the finding of such a practice. It was precisely to prevent the Board from perverting the intent of the section by resort to such circumventions that Congress caused its language to read that protected speech “shall not constitute *or be evidence of* an unfair labor practice . . .”

While in the instant case the Board has run itself afoul of the express provisions of 8(c), its contention as to its right to proscribe speech during election campaigns is open to even broader criticism. In enacting section 8(c) Congress drew the boundary between that speech which is constitutionally protected and hence, by definition must remain unfettered, and that which is unprotected and therefore subject to restraint. The enactment of the section was also an expression of Congressional belief that the purposes of

union elections could best be achieved by allowing full play to speech short of that prohibited by 8(c). Yet here the Board contends that it nevertheless has the right to restrain such speech by the expedient of labelling it "conduct" which interferes with the employee's free choice, rather than an unfair labor practice, and overturning elections in which it appears.

Stated baldly, this is an assertion that the Board's view as to the circumstances under which elections should be conducted, as embodied in its definition of what constitutes "laboratory conditions", should, in the event of conflict, prevail over Congress' views on the same subject.⁷ This is something like the cart pulling the horse. The Board has no authority other than that given it by Congress, nor any independent right to make policy. It must exercise its administrative discretion in a manner consistent with the Constitution, with the boundaries expressly or impliedly defined by the legislature, and with the policies enunciated by that body. In section 8(c) Congress has declared the point at which free speech begins. For the Board to restrain that speech, under any guise or in any manner, is by definition an infringement upon the right in violation of both express legislative policy and the constitutional guarantee itself. See the dissent by Justice Soper in *N.L.R.B. v. Shirlington Supermarkets, Inc.*, 224 F.2d 649 (4th Cir. 1955).⁸

7. The Board's test for its "laboratory conditions" is whether the act (or, according to the Board's present contention, speech) was "calculated to interfere with the employees' free choice". Of course almost all speeches given by an employer are calculated to do just that; they are meant to criticize the union and laud the employer's policies in an attempt to convince the employees to vote against unionization. Yet it is on the basis of this vague, but stringent test, bottomed primarily upon the Board's unreviewable discretion, that the Board would rest the employer's right of free speech.

8. This dissent, while perhaps somewhat misplaced under the facts of that case where the content of speech was not in issue, is

It is submitted therefore that the Board's actions with regard to the first election are thrice condemned: (1) because the Board construed the company's speeches in a narrow, unreasonable and arbitrary manner; (2) because the Board used speech protected by 8(c) as evidence of an unfair labor practice; and (3) because, in any event, the Board has acted in excess of its authority in restraining commentary which Congress and the Constitution declare should be permitted.

II. The Erroneous Treatment of the Objections to the Second Election.

On this topic the Board spends some time explaining why there was an absence of conflicting evidence. In support it cites various cases, in each of which the facts either were not disputed or, if they were, did not form a basis for setting aside the election even if taken as establishing the objecting party's contentions. We do not dispute that if this case fell into one of these categories it would be within the Board's authority to refuse to afford a hearing. What we do dispute, however, is the Board's facile method of determining whether or not factual issues exist. We also dispute the Board's shrugging aside as of no importance certain errors of law committed by the Regional Director.

Under the helping hand of counsel for the Board, the Regional Director's second supplemental decision achieves a breadth it lacked in the original. For instance, we learn that the Director refused to consider the undenied threat

precisely on point in the instant case. The point made by the dissent is much the same as that made above: If certain speech has been declared immune by constitutional and Congressional mandate, the Board should not be able to restrain it by the semantic expedient of calling it something other than an unfair labor practice and resorting to its self-fashioned administrative remedy of directing a new election to prohibit it.

made to Mr. Mendonca, because in the director's "judgment" any coercive impact which the threat might otherwise have had could be presumed to have dissipated (Bd. Br., p. 14). The fact is, as is evident from a reading of the decision, that the Regional Director dismissed the threat out of hand as of absolutely no legal significance. Its possible continuing impact on the employee involved and the other employees who witnessed the incident was not explored by the investigating agent nor considered by the Director in his decision. As the threat occurred on the day of the first election it is within the ambit of *The Singer Company*⁹ doctrine. The fact that it occurred at the beginning of the period which that doctrine says must be considered does not afford any justification for the Regional Director's complete refusal to concern himself with it, and its possible lingering effects. See, *Weather Seal, Inc.*, 161 NLRB No. 105, 63 LRRM 1428 (1966), and cases cited at pages 14 and 16 of the Company's opening brief.

The company contended that this threat was reinforced by subsequent telephone calls. In its brief the Board denies this is so and in support of this denial recites the unilateral "findings" of the Regional Director (Bd. Br., p. 15). It suggests the matter was settled by the employee's inherently ambiguous statement that the matter "had been cleared up and he was no longer afraid." In so reasoning the Board ignores the fact that these supposedly undisputed findings necessarily contradict the employer's sworn testimony that Mendonca had expressed a continuing fear *after* the telephone calls had been made (R. 88).

Board counsel continue to rewrite the Regional Director's decision in the discussion of the Scroggins incident (Bd. Br., pp. 16, 20). We are told that the employee's conflicting state-

9. 161 N.L.R.B. No. 87, 1967 CCH NLRB para. 20,874, 63 LRRM 1381 (1966).

ments as to what he was told were treated by the Regional Director as "immaterial", and the objection dismissed solely because there was no evidence that the union agent had "misrepresented" the foreman's attitude. However, the Regional Director's opinion reflects a number of things to the contrary (R. 45). For one, the Regional Director's opinion recites the employee's denial of the threat without mentioning his earlier conflicting statement, and it is obvious that the assumed truth of this denial contributed substantially to the Director's conclusion that the company's objection was lacking in merit. This *ex parte* crediting of the evidence is sufficient in itself to invalidate the Regional Director's decision.

Furthermore, that decision states only that the foreman made "certain complaints" about the employee, without specifying just what those complaints were. If the complaints did in fact amount to an expression of a desire to see the employee fired, the Regional Director would certainly include this pertinent bit of information in his opinion. Finally, the Regional Director's phraseology was that there was no evidence that the foreman's attitude had been "*substantially misrepresented*" to the employee. This is obviously something short of a finding that the foreman's attitude was what the union agent said it was, and when accompanied by the unrevealing assertion that "*certain complaints*" had been made, it leaves the entire issue beclouded. The foreman may have complained of any number of things which would not furnish sufficient justification for a union representation that he was out to get Mr. Scroggins fired.

In short, the last three sentences of this paragraph of the Regional Director's opinion contain nothing but conclusionary statements. Not one objective fact is set forth.

The factual conflict is sluffed over by an evasive shroud of words which skirt the basic issue, and reject the employer's objection without coming to terms with it.

As for the Gonzalez incident, it is not the hullabaloo surrounding his presence on the voting scene standing merely alone which is significant, but that presence superimposed upon the other interfering factors. *Home Town Foods, Inc. v. N.L.R.B.*, 379 F.2d 241, 244 (5th Cir. 1967). In an election decided by an extremely close vote, this incident in conjunction with the threats would certainly have compelled a finding that the Board's "laboratory conditions" had been undermined. *General Shoe Corporation*, 77 N.L.R.B. 124, 127 (1948); *Neuhoff Brothers, Packers, Inc. v. N.L.R.B.*, 362 F.2d 611 (5th Cir. 1966).

In the overall context, "substantial and material" issues were presented not only as to the factual conflicts above outlined, but also as to the interrelationship of the various incidents and their actual and potential effects on the voters. *Cf. Home Town Foods*, supra. The Regional Director's unilateral resolution of factual conflicts, his refusal to give certain incidents the legal significance to which they were entitled or to come to terms with others, his failure to consider the interrelationship and cumulative effect of the various incidents, and his refusal to afford a hearing where each of these factors could be explored and resolved, all conjoin to invalidate the action taken on the objections to the second election.

III. The Summary Finding of an Unfair Labor Practice.

In our opening brief we contended that the Board's consistent refusal to grant a hearing, even though some pertinent facts were in dispute and others had not been afforded their full legal significance, precluded an entry of sum-

mary judgment at the unfair labor practice stage. While this in itself would suffice to require reversal here, we also outlined certain other considerations in an attempt to demonstrate just what is involved when the Board resorts to the summary judgment device in a case such as this one, and why its use should be closely scrutinized by the courts. In this connection we contrasted the courts' strict approach to this device, on the one hand, with the situation pertaining when the Board treats as conclusive in a later unfair labor practice case "determinations" made via its loose, ex parte procedures applicable at the post election stage.

Though the Board persists in focusing upon the post election procedures (Bd. Br., p. 21), it was not just the post election hearing which was here foreclosed, but also a hearing on the unfair labor practice charge. As to the latter, the Congressional mandate embodied in Section 10 (b) is that the defendant is entitled to a full hearing on all issues, not, as the Board would have it, that defendant is to be afforded such a hearing only when he can discharge a burden of "clearly showing a need" for it. To the extent the summary judgment device has any application in such administrative hearings, the courts have treated it as subject to circumscriptions analogous to those applying to its use by the judiciary. *Kirby v. Shaw*, 358 F.2d 446 (9th Cir. 1966); *Neuhoff Brothers, Packers, Inc. v. N.L.R.B.*, 362 F.2d 611, 613-14 (5th Cir. 1966).

The Board's gross departure from these standards cannot be justified by any of the factors it advances. The Board points to its investigative machinery, which it generously characterizes as "impartial", as supplying a fact finding procedure not available to the federal district courts. While it may be the Board has a mechanism for investigation, it is also true that this machinery permits

the facts to be explored and determined *sub rosa*, and this hardly seems a sufficient substitute for the broad and open access to proof, through affidavits and discovery, which parties enjoy under the federal rules. 6 Moore, *Federal Practice*, sec. 56.15(5), p. 2391. Nor has Congress expressed any desire to eliminate "time-consuming formal proceedings." Quite to the contrary, it has explicitly provided that a party is not to be found guilty of an unfair labor practice without being furnished all the safeguards of a full and open hearing. For the Board to suggest otherwise is only another variation of the oft rejected theme that "it is more expeditious not to recognize rights." *N.L.R.B. v. Trancoa Chemical Corporation*, 303 F.2d 456, 462 (1st Cir. 1962).

Finally, we are told that the courts' reluctance to grant a summary judgment is bottomed upon a concern for the constitutional right to jury trial. But courts faced with such motions never express concern over whether or not a jury has been requested in the case or, indeed, whether or not the case is an appropriate one for a jury; nor do litigants offer these facts for the courts' consideration. What the courts do consistently express is their awareness that a grant of summary judgment deprives the party of his day in court and subjects him to a judgment without the safeguarding procedures which accompany a trial, jury *vel non*. *Lane Bryant v. Maternity Lane, Ltd. of California*, 173 F.2d 559, 565 (9th Cir. 1949); and see 6 Moore, *supra*, sec. 56.06, p. 2075.

If the numerous factual and legal issues surrounding the elections had come before the Board for the first time at the unfair labor practice proceeding, and if at this point the Board had conducted a private investigation, resolved the issues in an *ex parte* manner as did the Regional

Director and thereupon summarily found an unfair labor practice, its actions would be consistent neither with the statutory provisions nor with the requirements of due process. We fail to see by what alchemy the Board's actions in this case are rendered lawful merely because this same result was accomplished in three steps instead of one. We submit they were not; that the case should be remanded for a hearing wherein the issues can be fully and fairly determined.

CONCLUSION

It is respectfully submitted that the Court should refuse to enforce the Board's Order and either affirm the validity of the first election or remand for the required hearing.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. JUDGE ELDERKIN

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIZZIE ETTA LEMONS and
BENNIE MAURICE LEMONS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

SEP 29 1967

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UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

JURISDICTION AND STATEMENT
OF THE CASE

Appellants Lizzie Etta Lemons and Bennie Maurice Lemons were indicted on July 20, 1966, by the Federal Grand Jury for the Southern District of California, Central Division. ^{1/}

This indictment which was in four counts, charged essentially in Count One, that defendant Lizzie Etta Lemons, together with one Margaret Ward, unlawfully concealed 7.5 grams of heroin, in violation of 21 United States Code, Section 174. Count Two charged

^{1/} C. T. 2; "C. T." refers to Clerk's Transcript of proceedings.

Lizzie Etta Lemons and Margaret Ward with the unlawful sale of that same heroin. Count Three charged appellant Lizzie Etta Lemons with the concealment of 24 grams of heroin, in violation of Title 21, United States Code, Section 174. And Count Four charged appellant Bennie Maurice Lemons with the concealment of 101 grams of heroin in violation of Title 21, United States Code, Section 174 [C. T. 2-4].

On August 22, 1966, the indictment was ordered dismissed as to appellant Margaret Ward [C. T. 61].

Appellants Lizzie Etta Lemons and Bennie Maurice Lemons filed a Motion to Suppress Evidence on August 15, 1966, and the Government filed its opposition and supporting affidavits on August 15, 1966 [C. T. 14-20, 42-49].

The motion to suppress was heard and denied, and jury trial commenced as to appellants before the Honorable Walter E. Craig, United States District Judge, on August 22, 1966 [C. T. 68]. Further hearings were had on the Motion to Suppress on August 23, 1966, and the motion was again denied [C. T. 69].

On August 23, 1966, at 11:25 A. M. , the case was given to the jury for their consideration, and the Court ordered that the jurors be furnished with meals and lodging during the period of their deliberation [C. T. 69]. On August 23, 1966, at 11:48 P. M. , the jury was excused from deliberating further until 9:00 A. M. , August 24, 1966. Appellants moved for a mistrial, which was denied [C. T. 69].

On August 24, 1966, the jury resumed their deliberations

at 9:15 A.M., and at 1:55 P.M. appellants again moved for a mistrial, which motion was again denied [C. T. 72]. At 2:05 P.M., at the jury's request, the Court re-instructed the jury, after they stated they had reached a verdict as to one of the appellants, and the jury retired at 2:37 P.M., to further consider the case [C. T. 72]. At 3:15 P.M., the jury returned a verdict of guilty as to both appellants, and as to all counts in which they were charged [C. T. 72, 58-59].

On September 13, 1966, appellants were both sentenced to imprisonment for a period of five years [C. T. 70-71].

Notices of appeal were filed on September 13, 1966 [C. T. 82-83).

The jurisdiction of the District Court is predicated on Title 21, United States Code, Section 174, and Title 18, United States Code, Sections 3231 and 3237.

This Court has jurisdiction under Section 1291 and Section 1294, Title 28 of the United States Code.

STATUTES INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part:

"Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or

brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years, and in addition, may be fined not more than \$20,000

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

STATEMENT OF FACTS

On July 14, 1966, officers of the Los Angeles Police Department and the State Bureau of Narcotics Enforcement, together with one James Bircher, proceeded to 1715 and 1721 South Mira Monte Street in Ontario, California. ^{2/}

The Police Officers, who arrived in two automobiles [R. T. 8], had previously searched Bircher, who was a reliable informant, and found no narcotics on his person [C. T. 37; R. T. 10].

The informant approached the door of the dwelling house of Margaret Ward located at 1715 South Mira Monte, and was granted admittance [C. T. 37-38; R. T. 11].

^{2/} C. T. 37; R. T. 8; "R. T." refers to Reporter's Transcript of proceedings.

Approximately ten minutes later, the informant left the premises at 1715 South Mira Monte and proceeded next door to the premises located at 1721 South Mira Monte, where he was greeted at the door by appellant Lizzie Etta Lemons [C. T. 38; R. T. 19].

The informant handed a sum of currency to appellant Lizzie Etta Lemons, at the screen door of the Lemons' house, and she handed a package to the informant [C. T. 38; R. T. 21-22, 39-40, 65].

The informant then returned to the officers' car and gave them a celluloid container of what appeared to be heroin [C. T. 38; R. T. 33, 40-41], stating that it had been handed to him by appellant Lizzie Etta Lemons, pursuant to a telephone call made in his presence by Margaret Ward while the informant was in appellant Ward's house [C. T. 38].

The officers approached and knocked at the door of appellant's house. Receiving no response, they announced that they were police officers there to make an arrest for a narcotic violation and forced the door open [C. T. 38; R. T. 41-42].

In the back bedroom they found appellant Lizzie Etta Lemons counting the \$150 of pre-recorded state funds which had been handed her by the informant [C. T. 38; R. T. 42, 88]. They arrested her and advised her of her constitutional rights [C. T. 39; R. T. 42-43]. A search was made, at the time of the arrest, and an additional quantity of heroin was found in a metal box under the bed [C. T. 39; R. T. 68].

Appellant Lizzie Etta Lemons told the officers at the time

that her husband, appellant Bennie Maurice Lemons, was down in Tijuana, Mexico, but would be back later in the evening [C. T. 39; R. T. 44].

Some of the officers waited at the residence until approximately 12:30 A. M., when appellant Bennie Maurice Lemons arrived, and a subsequent search of his person disclosed a quantity of heroin inside his girdle [C. T. 39; R. T. 45-47].

ARGUMENT

I

THE MOTION TO SUPPRESS WAS PROPERLY DENIED

A. Probable Cause to Arrest Appellant
Lizzie Etta Lemons Existed Where
Officers Watched Her Hand a Package
to a Reliable Informant and Subsequent
Inspection of Package Showed That it
Appeared to Contain Heroin.

B. Probable Cause to Arrest Appellant
Bennie Maurice Lemons Existed Where
Officers Found Heroin in His Bedroom
and His Wife Had Stated He Was Return-
ing From Mexico That Evening.

The validity of an arrest made by state officers without a warrant is to be determined by the law of the state in which the arrest was made. Miller v. United States (1958), 357 U.S. 301, 2 L.Ed.2d 1332, 78 S. Ct. 1190; United States v. Di Re (1948), 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210. Under California law, an

arrest without a warrant is justified if the arresting officer has probable cause to believe that the person arrested has committed a felony. People v. Coleman (1965), 235 Cal. App. 2d 612, 45 Cal. Rptr. 542; California Penal Code, Section 836.

Probable cause for arrest is not limited to evidence that would be admissible at trial on the issue of guilt; the test is whether the facts as they appeared to the officers at the time of the arrest were such that a reasonable man would conclude that the arrested person should be held to answer. People v. Murphy, 173 Cal. App. 2d 367, 377, 343 P. 2d 273 (1959).

In the case of appellant Lizzie Etta Lemons, the officers had probable cause to arrest because they watched a reliable informant hand her a sum of money and saw her, in return, hand him a package which, upon inspection, appeared to contain heroin.

In the case of appellant Bennie Maurice Lemons, the officers had probable cause to arrest in that they had found narcotics under the bed in his home through a search incidental to the valid arrest of his wife and, further, his wife had told the police officers that he was returning from Mexico in a short time. The officers did not have practicable opportunity to obtain a warrant for the arrest of Bennie Maurice Lemons, because he was expected to return, and did in fact return, only a short time after the arrest of his wife. If he had been given a chance to see that the front door was broken he might have surmised what happened and destroyed the contraband in his possession.

II

THERE WAS NO "MISCONDUCT" WITH REGARD TO THE JURY'S DELIBERATIONS.

The Court instructed the jury that if it wished to communicate with the Court it could do so by means of a signed writing [R. T. 154]. There is no record that any juror took advantage of this offer to complain of any inconvenience. Nor did anyone bring any such matter up whenever the jury was in the courtroom. In the state of the record, appellants' assertions that the jury was deprived of "an atmosphere of free and unrestrained deliberations" is nothing more than unwarranted conjecture.

III

APPELLANTS WERE NOT DEPRIVED OF DUE PROCESS BY BEING ARRESTED TWICE.

Appellants were originally arrested by state officers for state narcotics violations. Thereafter, an indictment was returned by the Federal Grand Jury, and the appellants were arrested on warrants issued thereupon [R. T. 110].

Even if appellants could find authority for the somewhat novel proposition that two arrests on the same charge violate "due process" requiring dismissal of further prosecution or reversal, such authority would not be appropriate here, since the record discloses

that the two arrests were made for different violations, one local and the other federal.

CONCLUSION

An examination of the entire record indicates that appellants received a fair trial and, there being no prejudicial error, the judgment should be affirmed.

Respectfully submitted,

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United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.
WILLIAM J. GARGARO, JR.

No. 21941 ✓

See Vol 3403

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STRUCTURAL LAMINATES, INC., a
corporation,

Appellant,

v.

DOUGLAS FIR PLYWOOD ASSOCIATION,
a corporation,

Appellee,

PETITION FOR REHEARING OF APPELLANT,
STRUCTURAL LAMINATES, INC.

HONORABLE RUSSELL E. SMITH, Judge

FILED

AUG 5 1968

MAUTZ, SOUTHER, SPAULDING, KINSEY
& WILLIAMSON

LEE JOHNSON

THOMAS M. TRIPLETT

1200 Standard Plaza, Portland, Oregon 97204

WM. B. LUCK, CLERK

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STRUCTURAL LAMINATES, INC., a
corporation,

Appellant,

v.

DOUGLAS FIR PLYWOOD ASSOCIATION,
a corporation,

Appellee.

PETITION FOR REHEARING OF APPELLANT,
STRUCTURAL LAMINATES, INC.

HONORABLE RUSSELL E. SMITH, Judge

Appellant, Structural Laminates, Inc. petitions
the Court for rehearing upon the ground that the court erred
in affirming the decree in favor of the Douglas Fir Plywood
Association.

The opinion of the court (Op 2) states that it is
unnecessary for Structural Laminates to plead or establish

that the defendant acted with a bad purpose. The court suggests that both the existence of a conspiracy and the reasonableness of the appellee's conduct and the resulting restraint of trade may be established without evidence of motive or intent. Appellant readily agrees with this determination of the court.

This decision, however, points out the inconsistency of the trial court's findings. The court stated:

"Absent a bad purpose, what was defendant's anti-trust liability? It was responsible for the commercial standards which did effect adversely the marketing of plaintiff's product. Plaintiff's 3-ply 1/2" was suitable for inclusion in the commercial standards, but 3-ply 1/2" plywood did bear a poor reputation in the industry in 1958. Had defendant been vigilant, it might have concluded in 1958, or sooner, what it did conclude in 1962--that the bad reputation was unjustified.

If intent and purpose are factors in the anti-trust law, and the court believes they are except where per se violations are involved, then the mere failure of one who is responsible for the adoption of a commercial standard to appreciate changes which make that standard obsolete and to take immediate and effective action to alter it, does not amount to a conspiracy to restrain trade.* * * The court is of the opinion that in the absence of a bad purpose, mistakes made in the formulation or maintenance of standards do not subject the one making the mistake to anti-trust liability. (Opinion, record 289-290) (emphasis added)

It is quite clear from the trial judge's opinion that the Douglas Fir Plywood Association was negligent in its failure to include three ply one-half inch construction within the industry standards. The evidence, together with his findings, confirm this conclusion.

Negligence consists of what? It is the failure of an individual or group to act in a reasonably prudent manner under all of the circumstances then and there existing. It is thus clear that the conduct of the defendant was unreasonable vis-a-vis Structural Laminates.

The trial court's opinion and the decision of this court suggest that the conduct and restraint were reasonable. This finding and conclusion cannot be squared with the established fact of appellee's negligence.

The basic question raised is whether negligence by a trade association in formulating standards which drastically limit the marketability of a product gives rise to an anti-trust violation. Only in the event that the court finds that such negligence does not give rise to an anti-trust violation, can the various findings of the trial court be made consistent.

CONCLUSION

The judgment in favor of Appellee, Douglas Fir Plywood Association should be reversed.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING,
KINSEY & WILLIAMSON

By: Lee Johnson and
Thomas M. Triplett
Attorneys for Appellant,
Structural laminates, Inc.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this petition, I have examined Rule 40 of the Federal Rules of Appellate Procedure, which were made applicable to the United States Court of Appeals for the Ninth Court, effective July 1, 1968, and that, in my opinion, the foregoing petition is in full compliance with that rule. I further certify that this petition is in my judgment well founded and is not interposed for delay.

By Thomas M. Triplett
Thomas M. Triplett
Of Attorneys for Petitioner,
Structural Laminates, Inc.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOROTHY SHINDER,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

MITCHELL ROGOVIN,
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LEE A. JACKSON,
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FILED

JAN 1 1968

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21942

DOROTHY SHINDER,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court
(Doc. No. 12) are not officially reported.

JURISDICTION

This petition for review (Doc. No. 14) involves a deficiency in
Federal income tax for the taxable year 1963 in the amount of \$62.88.
On October 13, 1965, the Commissioner of Internal Revenue mailed
to the taxpayer a notice of deficiency, asserting a deficiency in
income tax in the amount of \$62.88. (Doc. No. 2, Ex. A.) Within
ninety days thereafter, on December 13, 1965, the taxpayer filed
a petition with the Tax Court for a redetermination of this

deficiency, under the provisions of Section 6213 of the Internal Revenue Code of 1954. (Doc. No. 2.) The decision of the Tax Court was entered April 7, 1967. (Doc. No. 13.) The case is brought to this Court by a petition for review filed April 25, 1967 (Docs. No. 1, 14), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTIONS PRESENTED

1. Whether the Tax Court erred in its determination that taxpayer was not entitled to file her 1963 Federal income tax return as a head of a household.

2. Whether the Tax Court erred in its determination that expenditures deducted by taxpayer were personal in nature, and were therefore not deductible.

STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 1. TAX IMPOSED.

* * *

(b) Rates of Tax on Heads of Households.--

* * *

(2) Definition of head of household.--For the purposes of this subtitle, an individual shall be considered a head of a household if, and only if, such individual is not married at the close of his taxable year, is not a surviving spouse (as defined in section 2 (b)), and either--

(A) maintains as his home a household which constitutes for such taxable year the principal place of abode, as a member of such household, of--

(i) a son, stepson, daughter, or step-daughter of the taxpayers, or a descendant of a son or daughter of the taxpayers, but if such son, stepson, daughter, stepdaughter, or descendant is married at the close of the taxpayer's taxable year, only if the taxpayer is entitled to a deduction for the taxable year for such person under section 151, or

(ii) any other person who is a dependent of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such person under section 151, or

(B) maintains a household which constitutes for such taxable year the principal place of abode of the father or mother of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such father or mother under section 151.

For purposes of this paragraph and of section 2 (b) (1) (B), an individual shall be considered as maintaining a household only if over half of the cost of maintaining the household during the taxable year is furnished by such individual.

*

*

*

(26 U.S.C. 1964 ed., Sec. 1.)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. 1964 ed., Sec. 262.)

STATEMENT

The facts, some of which were stipulated (Doc. No. 10) as found by the Tax Court, are substantially as follows (Doc. No. 12):

The Commissioner determined a deficiency in taxpayer's income tax for the taxable year 1963 in the amount of \$62.88. Taxpayer claims an overpayment in tax. Taxpayer is a single woman residing in San Francisco, California. Her individual income tax return for the taxable year 1963, together with four amended returns, was filed with the District Director at San Francisco, California.

During 1963, taxpayer resided alone in a rented apartment in San Francisco. She had no one dependent on her for support, nor did she expend any amount for the support of any other person.

During 1963, taxpayer spent \$225 in painting her apartment, \$25 for shelving therein, \$70 for expenses of moving from one apartment to another in San Francisco, and \$1,020 for rent of her apartments. Her respective landlords paid real estate taxes upon the buildings in which her apartments were located. Taxpayer claimed deductions for all of these expenditures either in her original or in her amended returns. The Commissioner disallowed each of these expenditures. The Tax Court upheld the Commissioner's determination. Taxpayer now petitions for review by this Court.

SUMMARY OF ARGUMENT

Taxpayer's petition for review in this case has absolutely no merit. It involves, in part, nothing more than an attempt by the taxpayer to lodge a protest on behalf of single persons who live alone, and is therefore an appeal which should properly be made to Congress, and not to this Court.

Taxpayer filed her 1963 federal income tax return as head of a household. The facts, as testified to by the taxpayer, as stipulated, and as found by the Tax Court, clearly show that the taxpayer meets none of the requirements set forth by the statute for filing a return as head of a household. The Tax Court correctly found that the taxpayer was not entitled to file her return as head of a household.

Taxpayer also claimed deductions on her 1963 federal income tax return for expenses incurred in painting her apartment, expenses for shelving therein, moving expenses, and rent, based on her contention that she is properly to be considered as head of a household. It is well established that these are personal living expenses for which no deduction is allowed, whether or not taxpayer is head of a household. Taxpayer also claimed a deduction for taxes paid upon the buildings wherein her apartments were located. This claim is entirely without merit since the taxpayer neither paid such taxes nor was under an obligation to pay such taxes, her claim resting entirely upon her assertion that since part of the rent which she paid was used by the owners to pay real estate taxes, she should be able to deduct such taxes.

The Tax Court's decision is amply supported by the record and should be affirmed.

ARGUMENT

I

THE TAX COURT DID NOT ERR IN ITS DETERMINATION THAT TAXPAYER WAS NOT ENTITLED TO FILE HER 1963 FEDERAL INCOME TAX RETURN AS A HEAD OF A HOUSEHOLD

Section 1 of the Internal Revenue Code of 1954, supra, provide the tax rates for persons filing their federal income tax returns as heads of households. A head of a household is defined, under Section 1, as an individual who is not married at the close of his taxable year, is not a surviving spouse, and either maintains as his home a household which constitutes the principal place of abode of a son, stepson, daughter or stepdaughter, or a descendent thereof or any person who is a dependent of the taxpayer, or maintains a household which constitutes the principal place of abode of the taxpayer's father or mother.

Taxpayer, in the instant case, meets none of the requirements set forth under Section 1 for filing a return as head of a household with the exception of the one requiring that she not be married at the close of her taxable year. Yet, for the taxable year 1963, she filed her income tax return as a head of a household. Taxpayer does not allege, nor does the record show, that she maintains a home which constitutes the principal place of abode for any of the persons listed under Section 1(b)(2) of the Code during the taxable year involved herein. The record shows, and the taxpayer testified, that

he lives alone in an apartment. She testified that no one who
is dependent upon her lives with her. (Doc. No. 11, p. 22.)
Indeed, there is no evidence that taxpayer has any dependents.
Taxpayer obviously does not come within the requirements for
filing as a head of a household, nor does she make any attempt to
show that she meets such requirements. Her brief (p. 12) and her
testimony indicate that she filed her return as a head of household
in protest (Doc. No. 11, pp. 12-13):^{1/}

Miss Shinder: The next issue is what brought me
to file as head of a household in protest.

We like to think that there is protection for the
people from the laws that exist--

*

*

*

/ Taxpayer's pleadings and brief suggest Constitutional issues
which have no merit. (Docs. No. 2 and 5; Br. 18, 32, 41-43.)
he contends that to deprive her of the status of head of a house-
hold under Section 1(b)(2) of the Code would amount to a denial
to her of equal protection of the laws under Amendment XIV of the
Constitution, and that to deprive her of this status would be
discriminatory against all persons in like circumstances. The
power to tax necessarily involves the power to classify for purposes
of taxation, and where there are differences between the subjects
that are taxed, Congress does not transcend the limits of its
taxing power by taxing them differently. Brushaber v. Union Pac.
St. R. Co., 240 U.S. 1; McCray v. United States, 195 U.S. 27;
Harclay & Co. v. Edwards, 267 U.S. 442. Neither the Fifth nor
the Fourteenth Amendment, if operative, forbids reasonable
classification. Beers v. Glynn, 211 U.S. 477; Heiner v. Donnan,
85 U.S. 312. Taxpayer also claims that her rights under Article I
and Amendments IV, V, XIII, XIV, XV, and XVI of the United States
Constitution have been violated (Br. 32), although we are at a
loss as to who she is alleging violated these rights.

Miss Shinder: But because I was renting and I was in my household, this all worked together and the government would not recognize the fact that because I lived alone, because I paid my own rent and because I had all these expenses, even though the law was written determining what a head of household was, every other individual received some kind of a benefit, except those who were single and lived alone.

The Tax Court's finding that taxpayer was not entitled to the status of head of a household is amply supported by the record, not clearly erroneous, and therefore should be sustained.

Commissioner v. Duberstein, 363 U.S. 278.

II

THE TAX COURT DID NOT ERR IN ITS
DETERMINATION THAT EXPENDITURES
DEDUCTED BY TAXPAYER WERE PERSONAL
IN NATURE, AND WERE THEREFORE NOT
DEDUCTIBLE

Taxpayer claimed deductions on her 1963 original and amended income tax returns of \$225 for expenses incurred in painting her apartment, \$25 for shelving therein, \$70 for expenses of moving from one apartment to another in San Francisco, and \$1,020 for ^{2/} of her apartments. (Doc. No. 12; Br. 3, 31.) Taxpayer also contended that she is entitled to a deduction for taxes paid upon the building wherein her apartments were located. (Br. 3, 31.) The Commissioner disallowed all of taxpayer's claimed deductions.

2/ On brief (pp. 3, 31), taxpayer alleges that she is also entitled to an allowable deduction of \$1,000 for damages which she claims she sustained because she was excluded from redevelopment and rent subsidy plans, and suffered a loss of her home through unfair practices. We know of no provision under the Code which would allow taxpayer such a deduction, nor does taxpayer point us to any provision allowing such a deduction.

Taxpayer testified at the Tax Court proceeding that the deductions which she claims for painting her apartment, for shelving, for moving expenses, and rent are based on the fact that she should properly be considered as head of a household for tax purposes. (Doc. No. 11, pp. 22-24.) Yet, on brief (p. 21), she alleges that she was badgered into making this claim, and that what she intended was to point out that her "rented apartment's additional expenses were separate and apart from the issue of Head of Household and that they were an additional injustice!"^{3/} The Tax Court correctly found that these expenses were not deductible in any event, whether or not taxpayer was allowed to file as head of a household. The court stated (Doc. No. 12, p. 4):

We are at a loss to understand how such expenses would be deductible even though petitioner were held to be the head of a household.

The expenses of painting, shelving, moving, and rent which taxpayer seeks to deduct fall squarely within Section 262 of the Internal Revenue Code of 1954, supra, as non-deductible personal expenses.

/ Taxpayer also claims (Br. 20-21) that she amended her petition (Doc. No. 5) to put into issue the deductibility of \$1,020 for rent, \$876.24 for withheld federal income tax, \$1,000 redevelopment including rent supplement, and \$68 survivors benefit, and suggests that the Tax Court failed to take these claimed deductions into consideration. These claimed deductions were dealt with in the testimony before the Tax Court, and on cross-examination it was explained that the \$1,000 in redevelopment referred to the urban renewal program of federal, state, and local Government (Doc. No. 11, p. 31-32); the \$68 in survivor benefits referred to payment to the estate of California's survivor's benefit insurance for state employees (Doc. No. 11, p. 32). The \$876.24 is the amount of federal income tax withheld from taxpayer's income during 1963. (Doc. No. 11, p. 27-28.)

Section 262 of the Code expressly disallows the deduction of personal, living, or family expenses. Deductions are a matter of legislative grace, and in order for taxpayer to receive the claimed deductions, she must be able to point to a specific provision of the Code and show that she comes within that provision. White v. United States, 305 U.S. 281; Deputy v. du Pont, 308 U.S. 488; Interstate Transit Lines v. Commissioner, 319 U.S. 590. Taxpayer has made no attempt to show that she is entitled to the claimed deductions under any provision of the Code, other than that she should be allowed to file a return as head of a household. Taxpayer has not met her burden of proving that these deductions are anything other than non-deductible personal expenses.

Taxpayer also claims that she is entitled to a deduction for taxes paid upon the property where her apartments were located. (Br. 3, 31.) She paid no such taxes, but alleges that she should be able to deduct that portion of the rentals paid by her which was used by the landlords to pay the real estate taxes. This claim is entirely without merit. The obligation to pay real estate tax upon the properties in which taxpayer's apartments were located rested on the owners of those properties and not on the taxpayer. Taxpayer did not pay the taxes personally and, even assuming that she had paid such taxes, since the obligation to pay such taxes was not hers, they would not be deductible by taxpayer. Kissel v. Commissioner, 15 B.T.A. 1270. Her payment of rent was purely a non-deductible personal expense.

The Tax Court's finding on this issue is a factual one, supported by the record, and should be affirmed.

CONCLUSION

For the reasons stated above, the decision of the Tax Court
is correct, and should be affirmed.

Respectfully submitted,

MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
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Attorneys,
Department of Justice.
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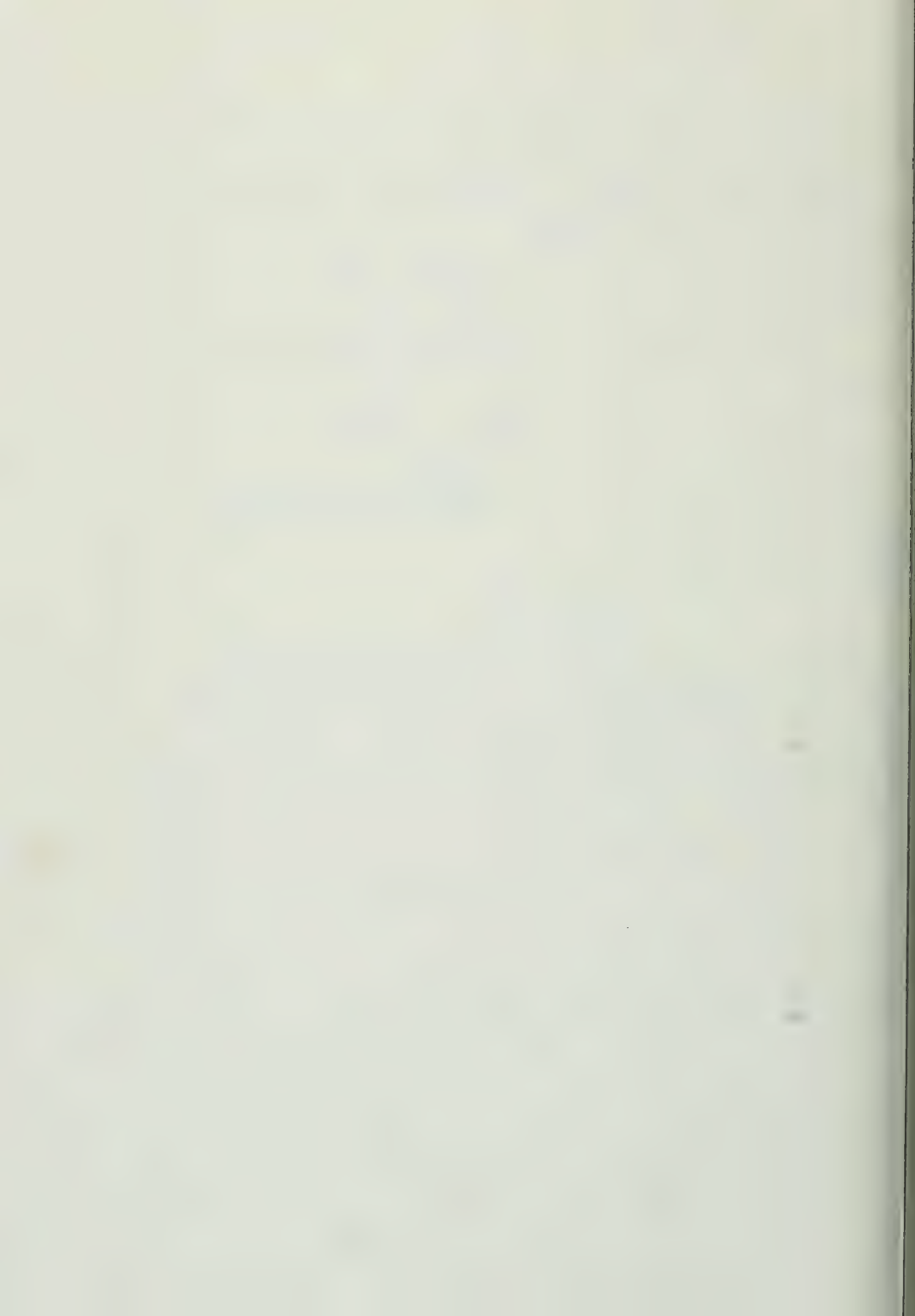
January, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this
brief, I have examined Rules 18, 19, and 39 of the United States
Court of Appeals for the Ninth Circuit, and that, in my opinion,
the foregoing brief is in full compliance with those rules.

Attorney

Dated: _____ day of _____, 19__.



No. 21,943

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERMAN MOHLAND, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
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DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
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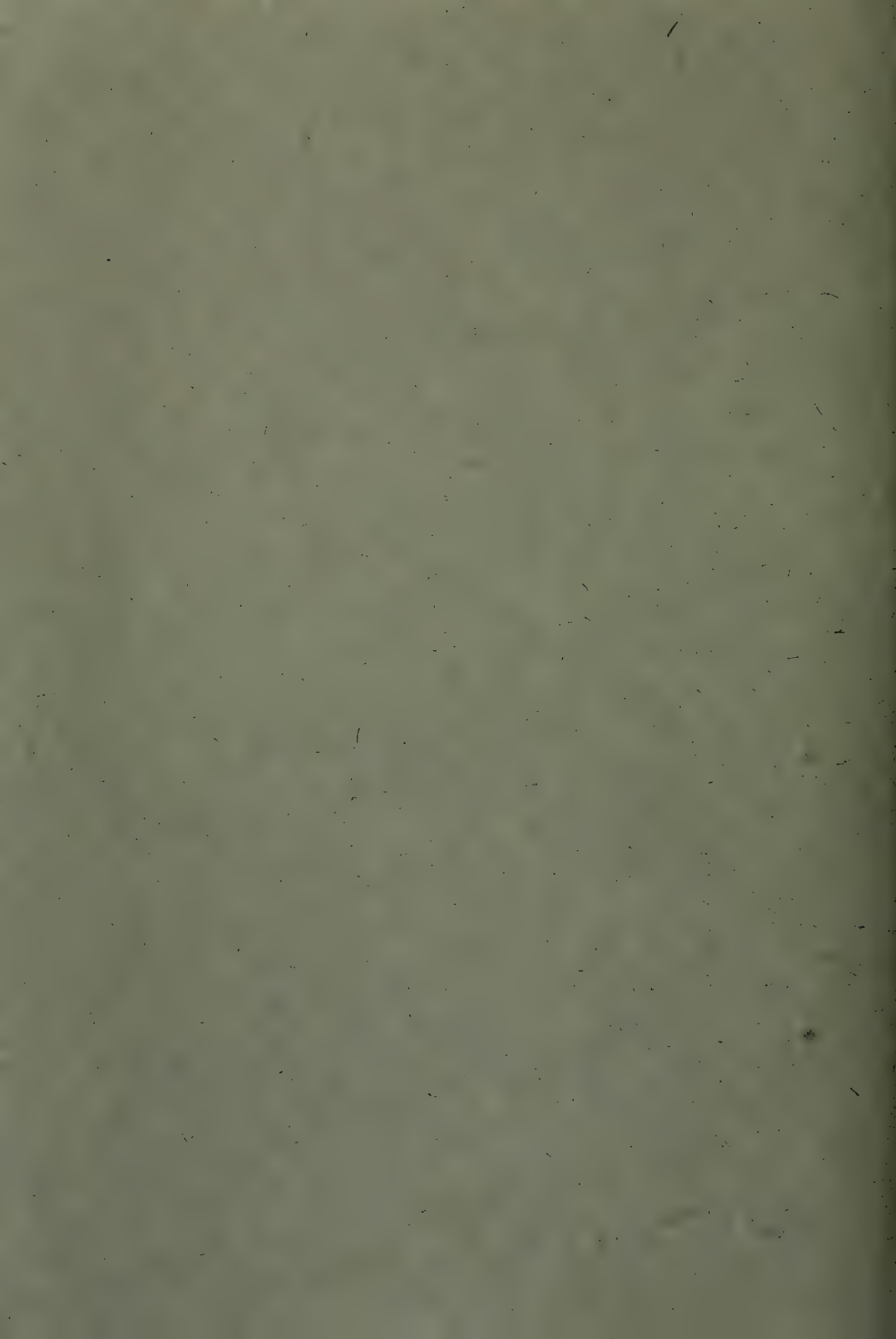
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National Labor Relations Board.

FILED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,943

HERMAN MOHLAND, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Herman Mohland (herein called "petitioner") to review and set aside an order of the National Labor Relations Board (R. 37-38)^{1/} issued on March 31, 1967, dismissing an unfair labor practice complaint against Hoerner-Waldorf Paper Products Co. (herein called "the Company"). Petitioner was the charging party before the Board. The Board's decision and order, issued pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.),^{2/} is reported at 163 NLRB No. 105. This Court has jurisdiction under

References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. References designated "GCX" are to the General Counsel's exhibits. Those designated "EX" are to the exhibits of the employer (Hoerner-Waldorf Paper Products Co.), respondent before the Board. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Board's findings; those following are to the supporting evidence. The pertinent provisions of the Act are set forth in the Appendix.

Section 10(f) of the Act, the alleged unfair labor practices having occurred in Missoula, Montana.

COUNTERSTATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that employee Herman Mohland, petitioner herein, was discharged for cause and not as a reprisal for his union activities. Accordingly, the Board dismissed the complaint in its entirety. The evidence upon which the Board based its findings is summarized below:

a. Background

Hoerner-Waldorf Paper Products Co., a Delaware Corporation with its principal offices in St. Paul, Minnesota, is engaged at Missoula, Montana, in the manufacture of paper board (R. 15; 4, 9). At all times material herein, the Company operated under a collective bargaining agreement with the Union ^{3/} (EX 1).

Herman Mohland, a union member, was hired by the Company in April 1962. In December 1965, he requested that he be transferred to the maintenance department (R. 17, 20; Tr. 52, 58, 64). Mohland, who was then 34 years old, was informed by Company officials before his transfer that the training program for progression in the maintenance department was, as a matter of practice, restricted to employees under age 30 (R. 20; Tr. 211-213). In fact, the Union had requested a formalized training program in the autumn of 1965, and a joint union-management committee had drafted a proposal which, except in the case of employees with prior mechanical experience, was specifically limited to employees under age 30 (R. 20; Tr. 95, 108-109, 211-212, 216).

/ International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO.

Mohland voiced his opposition to the age requirement at union meetings and the proposal was rejected by the union membership in December 1965. A counterproposal, deleting the age restriction, was rejected by the Company on January 27, 1966 (R. 20; Tr. 59-63, 110-111, GCX 10). In April 1966, Mohland filed a grievance alleging that he had been unfairly denied a promotion because of his age (R. 21; Tr. 66-67, 213, GCX 5).

- b. The Company initiates new timecard procedures; Mohland refuses to comply with these procedures and is discharged

On March 11, 1966, the Company installed new time clocks.

Employees were instructed to fill in the amount of straight time, overtime, and total hours worked on the new daily timecards (R. 17; Tr. 192, 194). Mohland complied with the instructions until April 15, 1966, when employee Bob Reed told him that he had been underpaid by the Company after mistakenly recording several hours of overtime as straight time (R. 17; Tr. 73-74, 150-151). In discussing Reed's story with other employees, Mohland learned that employee Dave Palmer had been paid straight time for working on a holiday after making a similar mistake in his timecard (R. 18; Tr. 75).^{4/}

After April 15, 1966, Mohland refused to fill in the columns in his timecard for straight time, overtime, and total hours worked (R. 18; Tr. 74). Employees Wally Tucker and Jace Dove also refused to complete their timecards after mid-April (R. 21; Tr. 164-166, 169-170). Until mid-May, Mohland's timecards were completed by Maintenance Foreman Norm Carlson, who assumed that Mohland's failure to fill in the missing

Both Reed and Palmer were subsequently paid for the correct amount of overtime (R. 17, n. 4, R. 18, n. 5).

information was inadvertent (R. 18; Tr. 192-194). Pat Nelson, the supervisor who handled Dove's and Tucker's cards, was also unaware of any intentional refusal to comply with the Company's instructions (R. 21, 22; Tr. 266-268). During the first week in May, however, Foreman Carlson became aware that Mohland was repeatedly failing to complete his card and discussed the problem with his supervisor, Herman Effenberger. Effenberger directed Carlson to send the incomplete cards into the office, thus delaying Mohland's pay. At Effenberger's suggestion, Carlson also reprimanded Mohland on May 16 (R. 18; Tr. 193, 198-199). When Carlson attempted to explain how to fill in the timecards properly, Mohland replied that he understood the procedure, but that "since the Company was making it a practice to cheat the men," he did not want to accept the responsibility for mistakes on his timecard (R. 18; Tr. 76). Carlson then warned him that if his cards were not completed properly they would not be signed and his pay would be delayed (R. 18; Tr. 77, 79). Mohland completed his timecard that afternoon (R. 18; Tr. 77-78).

However, on the following day, May 17, Mohland again failed to complete his timecard. That night, a resolution that all union members refuse to compute their own time, drafted and vigorously promoted by Mohland, was unanimously passed at the union meeting (R. 18; Tr. 78-79). On May 18 and 19, Mohland again refused to comply with the instructions and was reported by Lead Mechanic Martin Hegel to Effenberger, who in turn reported Mohland's insubordination to Production Manager Robert Sallee. Sallee immediately called for a meeting between Company and Union representatives to determine whether Mohland

had actually refused to obey the Company's posted rules and the instructions given him by his foreman on May 16 (R. 19; Tr. 209-210, 260-261).

At the meeting on the morning of May 20, 1966, which was attended by Sallee, Carlson, Personnel Manager Robert Prouty, Union President Wallace Lowell, and Union Standing Committee Chairman Pat Colyer, Mohland was asked why he had not been completing his timecards as instructed (R. 19; Tr. 82-83). When Mohland referred to the Union resolution posted on the bulletin board on May 19,^{5/} Sallee stated that he was concerned with Mohland's behavior on May 16 and 17, prior to the resolution. Mohland then related the experiences of Reed and Palmer, and repeated his assertion that he did not want to accept responsibility for mistakes in timekeeping. (R. 19; Tr. 83-84). In response to further questioning, he admitted that he had read and understood the Company's instructions with respect to the timecards. Sallee then said, "As much as I regret to do this, I have no other choice than to discharge you immediately, exercising our right as guaranteed in the contract for disobedience."^{6/} (R. 19; Tr. 84).

^{5/} An estimated 90% of the men complied with the resolution (R. 21; Tr. 269).

^{6/} Section 28 of the contract between the Company and the Union specifies disobedience and refusal to comply with posted rules as causes for immediate discharge (EX 1).

Later that day, Sallee and Union President Lowell agreed to resolve the timecard dispute through the grievance procedure and the Union resolution was rescinded (R. 19-20; Tr. 246, EX 16). At a labor-management meeting one week later, the Company agreed that thereafter only the total hours spent on each job would be recorded by the employees (R. 20; Tr. 242-244).

On May 24, 1966, Mohland filed charges with the Board alleging that his discharge had violated Section 8(a)(3) and (1) of the Act and that the Company's refusal to supply the Union with certain information had violated Section 8(a)(5) and (1) of the Act (R. 16; 3). Shortly before June 6, he filed a grievance relating to his discharge (R. 16; EX 6). It was processed through the first three steps specified by the contract; then, after agreeing to bypass the fourth step, the Company and the Union agreed to proceed to arbitration (R. 16; Tr. 20-24, 49-50). The Company moved that Board proceedings, pursuant to the Complaint which had been issued on July 18, 1966, be deferred pending completion of arbitration. On September 27, 1966, the motion was denied (R. 16; 4-6, 11-13, 14), and arbitration proceedings have not been held (R. 17).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found that Mohland was discharged for cause and not because of his protected union activities. Accordingly, the Board adopted the Trial Examiner's recommendation that ^{7/}the complaint be dismissed in its entirety.

7/ The Board further found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with information necessary for administration of the contract and for future negotiations, but concluded, in view of the fact that the information had been given to the Union before the hearing, that the purposes of the Act would not be effectuated by the issuance of a remedial order. Review is not being sought of this portion of the order.

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE
SUPPORTS THE BOARD'S FINDING THAT EMPLOYEE
HERMAN MOHLAND WAS DISCHARGED FOR CAUSE AND
NOT BECAUSE OF HIS UNION ACTIVITIES.

As shown in the Counterstatement, the Company's instructions for completing its new time-cards were posted and explained to the employees on March 11, 1966. The Union voiced no immediate objection to the new system, which made the employees responsible for properly recording their own straight time, overtime, and total hours worked. After mid-April 1966, however, petitioner, admittedly acting as an "individual" (Tr. 106), refused to comply with the Company's rules. He did not relay his complaint to the Company's management, nor did he inform his union steward of his actions or attempt to make use of the grievance procedures available for the resolution of such disputes. In fact, he continued his defiance of managerial authority even after the Union discussed the problem with company officials at a labor-management meeting on May 3, 1966, and agreed that, because of the Company's limited clerical staff, the employees should bear the responsibility for properly recording their own time (Tr. 135-136). Finally, he disregarded the specific warning communicated to him by Foreman Carlson on May 16, 1966.

It is settled law that such insubordinate conduct, amounting to a refusal to perform assigned tasks during working time, falls outside the protection of Section 7 of the Act and constitutes adequate cause for discharge. See, e.g., Machaby v. N.L.R.B., 377 F. 2d 59 (C.A. 1); N.L.R.B. v. Camco, Inc., 369 F. 2d 125, 128-129 (C.A. 5); N.L.R.B. v.

Louisiana Mfg. Co., 374 F. 2d 696, 705-706 (C.A. 8); N.L.R.B. v. Ace Comb.Co., 342 F. 2d 841, 847-848 (C.A. 8); N.L.R.B. v. Red Top Cab & Baggage Co., _____ F. 2d _____, 66 LRRM 2311, 2317-2318 (C.A. 5, No. 21,316, decided October 6, 1967). Moreover, Mohland's conduct between May 3 and May 17 was at odds with the position taken by his bargaining agent. Courts have recognized that the use of disruptive tactics by individual union members or dissident groups may interfere with, rather than promote, the protected right to bargain collectively. N.L.R.B. v. Sunset Minerals, Inc., 211 F. 2d 224, 226 (C.A. 9); N.L.R.B. v. R. C. Can Co., 328 F. 2d 974, 978-979 (C.A. 5); N.L.R.B. v. Sunbeam Lighting Co., 318 F. 2d 661, 662-663 (C.A. 7); Plasti-Line, Inc. v. N.L.R.B., 278 F. 2d 482, 486 (C.A. 6). The fact that the Union later reversed its position and adopted Mohland's tactics, however, does not, as the Board noted, justify his earlier defiance of both posted rules and the direct verbal instructions of his foreman.^{8/}

Even assuming, arguendo, that Mohland's termination was attributable in part to his continued refusal to complete his timecard after the resolution, the Board's decision was proper. It has been established that ". . . the protective mantle of Section 7 is tempered by the employer's right to exact a day's work for a day's pay and to maintain discipline, and does not reach activities which inherently carry with them a tendency toward, or likelihood of, disturbing efficient

^{8/} Production Manager James Sallee testified that Mohland's discharge had been predicated on his disobedience on May 16 and 17, before the Union resolution (Tr. 230).

operation of the employer's business." Caterpillar Tractor Co. v. N.L.R.B., 230 F. 2d 357, 358 (C.A. 7). Accord: Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 797-798. In the instant case, the contract provisions for processing grievances concerning the terms and conditions of employment were unquestionably adequate.^{9/} The employees, however, elected to take matters into their own hands by remaining at work and accepting pay, but, without resorting to the grievance procedure, refusing to comply with the disputed rule. While Section 7 of the Act affords protection to a wide variety of concerted activities for the purpose of effecting changes in working conditions, including, in certain circumstances, the right to strike,^{10/} not all concerted activities are protected. U.A.W. v. Wisconsin Employment Relations Board, 336 U.S. 245, 260-261; N.L.R.B. v. Blades Mfg. Corp., 344 F. 2d 998, 1004-1006 (C.A. 8), and cases cited therein. See also, N.L.R.B. v. Insurance Agents International Union, 361 U.S. 477, 492-494. The Act does not guarantee to employees the right to "insist on remaining at work on their own terms and conditions." N.L.R.B. v. Kohler Co., 220 F. 2d 3, 11 (C.A. 7). See also Machaby v. N.L.R.B., 377 F. 2d 59 (C.A. 1). They must remain "on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance." C.G. Conn Ltd. v. N.L.R.B., 108 F. 2d

^{9/} As shown, supra, p. 6, the Company and the Union later resolved the dispute through the grievance procedure.

^{10/} It should be noted that in this case the Union was bound by a contract provision prohibiting any "interruption of work" during the term of the agreement (EX 1, Sec. 5). The Board did not decide whether or not the Union's resolution in this case violated that clause (R. 22).

390, 397 (C.A. 7). Accord: N.L.R.B. v. J. I. Case Co., etc., 198 F. 2d 919, 1022 (C.A. 8), cert. denied, 345 U.S. 917; Home Beneficial Life Ins. Co. v. N.L.R.B., 159 F. 2d 280, 286 (C.A. 4).^{11/} In the instant case, we submit, the form of protest initiated by petitioner and later adopted by the Union was clearly unreasonable in light of the ends sought to be achieved and the alternative methods available. Cf. Dobbs Houses, Inc. v. N.L.R.B., 25 F. 2d 531, 538-539 (C.A. 5). Accordingly, Mohland's continuing defiance of instructions left him vulnerable to lawful discharge.

The only question remaining, then, is whether substantial evidence on the record as a whole supports the Board's finding that petitioner was discharged because of his insubordination.^{12/} He contends that he was discharged because of his vigorous opposition to the proposed training program, his filing of a grievance concerning the Company's failure to promote him, and his actions in drafting and promoting the union timecard resolution. It is settled, however, that "engaging in protected concerted activity, such as filing grievances, does not immunize employees against discharge for legitimate reasons. The burden of proof

1/ See also Morrison-Knudsen Co., Inc. v. N.L.R.B., 358 F. 2d 411, where this Court, in finding employee protests over allegedly unsafe working conditions to be protected, noted that they were "within permissible bounds and * * * did not, as the Company contended, usurp the authority of the foreman or interfere with the latter in directing the work." (358 F. 2d at 414-415).

1/ Petitioner errs in contending (br. pp. 23-26) that it was violative of federal law for the Company to require the employees to record their own time on their timecards. Under Section 11(c) of the Fair Labor Standards Act (29 U.S.C., Sec. 211(c)), employers are responsible for the record-keeping requirements of the Act. However, an employer may delegate certain portions of such record-keeping to his employees, with ultimate responsibility for such record-keeping resting on the employer. Goldberg v. Cockrell, 303 F. 2d 811, 812 n. 1 (C.A. 5).

is still upon the General Counsel to show that the protected activity was a cause of the discharge." Hawkins v. N.L.R.B., 358 F. 2d 281, 283-284 (C.A. 7). Accord: R. J. Lison Co., Inc. v. N.L.R.B., 379 F. 2d 814, 817 (C.A. 9); Lozano Enterprises v. N.L.R.B., 357 F. 2d 500, 502-504 (C.A. 9); Shattuck Denn Mining Corp. (Iron King Branch) v. N.L.R.B., 362 F. 2d 466, 468-469 (C.A. 9), and cases cited therein. Accordingly, circumstances which "merely raise a suspicion" of unlawful motivation will not support a finding of discriminatory discharge. Lozano Enterprises v. N.L.R.B., supra, 357 F. 2d at 503.

Thus, the Board found that the incidents which petitioner contends were the real reason for his discharge occurred over a period of 6 months preceding the Company's decision to terminate him. Although Company officials knew that Mohland's opposition had prevented ratification by the Union of the proposed training program (R. 21; Tr. 225), the record reveals no evidence of hostility toward him in the following months. It appears unlikely that any basis for hostility existed, in light of the uncontradicted testimony by a Company official that the Union itself had originally proposed the plan and that the company had no particular interest in its adoption. As Production manager Sallee testified, the Company had enjoyed "considerable latitude in training maintenance personnel" under the informal training program already in existence. (Tr. 216). His statement to union representatives that Mohland's opposition was "their problem, not ours" illustrates the Company's lack of concern at the failure to agree on a program (Tr. 225).

Similarly, the record failed to establish any connection, other than proximity in time, between petitioner's discharge and his grievance concerning the Company's failure to promote him. No evidence of Company hostility or attempts to frustrate its processing was presented. In fact, the Company's representative stated that he felt it involved a "basic issue" and agreed to refer it to a more advanced stage in the grievance procedure (R. 21; Tr. 114-116). In these circumstances, as this Court observed in Lozano, supra, unlawful discrimination cannot be inferred from "mere union activity or membership, followed by discharge" (357 F. 2d at 502).

As to the contention that Mohland was discharged because he drafted and vigorously promoted the union timecard resolution, the Board's finding that the Company had no knowledge of his part in its adoption seems dispositive. Proof that an employer knew of his employee's protected activity is, of course, essential to a finding that the employee was discharged for engaging in that activity. Salinas Valley Broadcasting Corp. v. N.L.R.B., 334 F. 2d 604, 613 (C.A. 9); N.L.R.B. v. Shastopol Apple Growers Union, 269 F. 2d 705, 711 (C.A. 9); N.L.R.B. v. Kiser Aluminum & Chemical Corp., 217 F. 2d 366, 368 (C.A. 9); N.L.R.B. v. Ace Comb Co., 342 F. 2d 841, 848 (C.A. 8). Petitioner's argument (cc. pp. 17-18) that the Company must have known of Mohland's part in the union resolution of May 17, is based only on speculation which, of course, cannot substitute for proof.

Petitioner points to the fact that other employees who also refused to complete their timecards were not discharged or otherwise disciplined. The Board found, however, that the Company's management

did not become aware of Tucker's and Dove's refusals until well after Mohland's discharge. Production Manager Sallee's credited testimony indicates that, although he had learned of the union resolution posted on May 19, he did not know at the time of Mohland's discharge that any other employees had refused to complete their timecards (R. 22; Tr. 214, 27).^{13/} The Board, we submit acted reasonably in concluding from the above testimony that Mohland's dismissal was not, as he contends, a discriminatory application of company rules. See, e.g., N.L.R.B. v. T. Grant Co., 315 F. 2d 83, 84-86 (C.A. 9). The fact that Mohland was given an explicit warning by his foreman and afforded an opportunity to abandon his insubordinate tactics further refutes the contention that the Company was looking for an excuse to discharge him.

Finally, petitioner asserts (br. p. 32) that the Company's decision to discharge him, rather than impose some less severe disciplinary measure, evidences its unlawful motivation. This argument is without merit. It is settled law that when conduct warranting disciplinary action has been established, the extent or severity of that action is normally within the discretion of the employer, not the Board. N.L.R.B. v. Ace Comb. Co., supra, 342 F. 2d at 847; N.L.R.B. v. Ogle Protection Service, Inc., 375 F. 2d 497, 505 (C.A. 6). See also, N.L.R.B. v. Sebastopol Apple Growers Union, supra, 269 F. 2d

1. It is settled that credibility resolutions are matters for determination by the trier of fact which, if reasonable, will not be disturbed upon review. R. J. Lison Co. v. N.L.R.B., 379 F. 2d 814, 817 (C.A. 9); N.L.R.B. v. Local 776 IATSE (Film Editors), 303 F. 2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826.

t 712-713, and cases cited therein. Although disciplinary action which is wholly disproportionate to the employee's offense may be a factor which the Board may take into account, together with other circumstances, in ascertaining the employer's motivation, the record in the instant case viewed as a whole, fails to establish that the Company seized upon petitioner's insubordination as a pretext to get rid of him because of his participation in any protected activity.

In sum, the record provides ample basis for the Board's finding that petitioner was discharged, not because of his protected activities, but because of his admitted insubordination. The question is one of "actual motive, a state of mind" (Shattuck Denn Mining Corp. v. N.L.R.B., supra, 362 F. 2d at 470), and this Court's function upon review is a limited one. "When the record evidence concerning an employer's motivation in discharging an employee will reasonably permit of two fairly conflicting views, a reviewing court will not displace the choice of the Board." Hawkins v. N.L.R.B., 358 F. 2d 281, 83 (C.A. 7).^{14/} In the above circumstances, the Board's inference as, at the least, reasonable.

^{4/} Accord: N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404, 405; R. J. Lison Co. v. N.L.R.B., 379 F. 2d 814, 817 (C.A. 9).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to review and set aside the Board's order should be denied.

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December 1967.

CERTIFICATE

The undersigned hereby certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
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NATIONAL LABOR RELATIONS BOARD

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 et seq.) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section (a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer--

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

APPENDIX B

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General Counsel's Exhibits

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>
1(a) through 1(j)	4	4	4
2	53	54	54
3	55	56	56
4	57	58	58
5	67	69	69
6	71	73	73
7	80	80	80
8	85	86	86
9	86	87	88
10	110	118	118
11	131	132	132
12	181	181	(Rejected)
13	204	205	205

Respondent's Exhibits

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>
1	19	20	20
2	19	20	20
3	22	23	23
4	22	23	23
5	24	25	25
6	26	28	28

No. 21,944 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PVT. FELIX CHAVEZ, JR.,

Appellant,

VS.

MAJOR GENERAL R. G. FERGUSON, U.S.

Army, Commanding General, Fort
Ord, California,

Appellee.

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FILED

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No. 21,944

IN THE

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PVT. FELIX CHAVEZ, JR.,

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Ord, California,

Appellee.

BRIEF FOR APPELLANT

I

THE PLEADINGS AND FACTS AS TO JURISDICTION

Plaintiff below, and Appellant here, brought this action in the District Court against Defendant, Appellee here.

The complaint for Declaratory Judgment and Injunction alleged that Appellant became a conscientious objector after he became a member of the Armed Forces. When he became a believer in the teachings of the Jehovah's Witnesses, he conscientiously objected to war in any form and he so informed his Commanding Officer. Because of his

religious training and beliefs, he was unable to participate in any military training; in preparation for war; or to salute an officer. Nevertheless, he was given such an order and when he refused, he was court-martialed and sentenced to hard labor for a period of six months, which he spent at the post stockade.

After being released from the stockade for nine days, he was given the same order as before as to training and saluting, which he, for the same reason as before, was unable to comply with and he was court-martialed the second time. He was again found guilty and sentenced to six months at hard labor, spending that period at the post stockade.

In April, Appellant filed with Appellee a request for administrative discharge on prescribed military form DA 1049. He requested the discharge in accordance with UP AR 635-20 as a conscientious objector.

Appellant qualified under above regulation for administrative separation from service. However, the Appellee, for no legal reason nor justification, denied Appellant's application for discharge.

Appellant was also ordered by Appellee to appear before a Clemency Board before which he stated that he cannot, because of his religious training and belief, comply with any order that is to be given to him to prepare for war. Appellant's Commanding Officer informed him that he will attempt to obtain a discharge as unsuitable for military service under AR 212. However, Appellee refused to grant such discharge contrary to the provisions of said regulation.

Thereafter, the Commanding Officer gave Appellant an order which he could not conscientiously carry out and further ordered him to be tried before a general court-martial, charging him with violation of Article 90 of the Uniform Code of Military Justice.

The complaint alleged that Appellee's refusal to obey the orders caused him to be tried twice before a court-martial and is threatened with a third court-martial were orders which were and are illegal, unlawful and beyond the scope of Appellee's authority. It is illegal because the Appellee failed to comply with AR 635-20, which requires Appellant's administrative discharge. It is further illegal because of Title 50 USC Sec 456 (j) under which Appellant qualifies for exemption to military service. Appellant also claimed that Appellee was informed of his inability to participate in preparation for war, nevertheless, caused him to be court-martialed twice and threatened with a third one; thus depriving him of due process of law.

The complaint alleges that Appellee's illegal and unconstitutional acts cause Appellant to suffer irreparable injury which cannot be monetarily compensated for and Appellee threatens him with further unlawful and unconstitutional acts unless restrained by the Court. Appellant claimed that he is entitled to a Declaratory Judgment to the effect that Appellee's past and threatened acts are illegal and void and further that Appellant is entitled to separation from military service in accordance with AR 635-20. The complaint prayed for such relief.

The District Court issued upon the Appellee an order to show cause why he ought not to be restrained from compelling Appellant to be tried before a court-martial for the third time.

The Appellee filed his Return, alleging that the complaint doesn't state a claim upon which relief can be granted and that the Court has no jurisdiction of the subject matter. The Trial Court filed its Memorandum and Order, holding that the relief prayed for is inappropriate and further that the Court is without jurisdiction to grant a Declaratory Judgment. The Order to Show Cause was discharged and the action was dismissed. Appellant thereupon appealed to this Court.

The complaint alleged that the District Court has jurisdiction under 28 USC 1331 and 28 USC 2201-2. It is submitted that this Honorable Court has jurisdiction under 28 USCA Para. 1291.

II

STATEMENT OF THE CASE

Appellant was born in Los Angeles on March 23, 1944, and graduated from high school in 1961, after which he worked in various employments. At the age of 18 he began to work for his father, driving a truck and he did so until he went into active military service at Fort Ord on September 10, 1965. Neither when joining the Reserves nor later when called to active duty was he a conscientious objector. He be-

came such after he studied and adhered to the teachings of the Jehovah's Witnesses; his conscientious objection matured on or about October 19, 1965, while serving at Fort Ord, where the Commanding General was the Appellee. After accepting the teachings of the Jehovah's Witnesses, he could not carry out any order which involved training for preparation of war; he could not salute an officer, and could not in any manner participate in military work. He so informed his Commanding Officer who, nevertheless, ordered him to be court-martialed when he refused to carry out the order to salute. He was sentenced to and suffered imprisonment at the stockade for six months. Upon being released for a short time, and even though he again informed his Commanding Officer that he cannot in any manner participate in military work nor carry out any order, he was given such an order to the same effect, and when he was unable to comply, he was again court-martialed and given a further six months' sentence, which he spent at the post stockade. After being released, he filed form 1049, requesting his discharge in accordance with AR 635-20, which provides for such discharge for conscientious objectors, as Appellant, pursuant to sub-paragraph 3a:

“Consideration will be given to requests for separation based on conscientious objection to participate in any war, when such objection develops subsequent to entry into military service.”

However, Appellee denied his request for separation, and did so without any legal reason and contrary to the above regulation.

Thereafter, Appellant's Commanding Officer, who became convinced of his sincerity and honesty in claiming to be a conscientious objector, attempted to obtain his separation from service in accordance with another Army regulation AR 212, as unsuitable, but Appellee denied such further request.

Appellant, maintaining his conscientious objection to military service on religious grounds, informed his Commanding Officer of his inability to carry out any order pertaining to the preparation for war, nevertheless, was given an order which he could not carry out and was ordered to be tried before a general court-martial.

Appellant claims that he was entitled to separation and the denial of such separation by the Appellee was illegal, unconstitutional and void, and it was in clear defiance of AR 635-20. It was also contrary to the provisions of Title 50 USC 456 (j) pertaining to conscientious objectors.

The Appellant also claims that the second and the threatened third court-martial put him into multiple jeopardy in that he consistently held to his position as a religious objector to military service and preparation for war, and that the orders given to him, even though separated in time, were identical. The orders that brought about his first and second court-martial and the one on which the threatened third court-martial is based were given even though it was known that Appellant would not be able to carry them out because of his conscientious objection, and in conse-

quence, such orders were in violation of Uniform Code of Military Justice because the same was given

“ . . . for the sole purpose of increasing the penalty for an offense which is expected the accused may commit . . . ”

The orders which were given and which Appellant was unable to carry out because of his conscientious objection to participation in war in any form constituted entrapment in that if he were to carry out the orders because of the threatened punishment, he would prove himself not to be a conscientious objector, while if he remained truthful to his conscience, then he was to be punished by the courts-martial.

III

SPECIFICATION OF ERRORS

Appellant contends that it was error for the District Court to deny the relief prayed and to dismiss the cause because:

(1) The United States District Court has jurisdiction over the subject matter.

(2) Pursuant to the jurisdiction, declaratory relief should have been granted.

(3) Appellant's right not to be put into multiple jeopardy is of constitutional dimension, the violation of which places the issue within the jurisdiction of the Federal Courts.

(4) Appellant's right not to be compelled to participate in war contrary to his religious training and belief is similarly of constitutional dimension and the jurisdiction of the Federal Court extends over the issues.

(5) The relief prayed for in the complaint should have been granted by the District Court, and this Court ought to order that the issues be tried on the merits.

IV

ARGUMENT

(1) **THE UNITED STATES DISTRICT COURT HAS JURISDICTION OVER THE SUBJECT MATTER.**

The Trial Court in its Memorandum and Order (TR 30-34) stated that

“No authority has been advanced by plaintiff for the proposition that the Army lacks jurisdiction to court-martial for disobeying orders an enlisted soldier who has made the claim that he is a conscientious objector. In the absence of such authority, this Court can only conclude that the defendant is acting within the scope of his jurisdiction.” (TR 32)

Appellant believes that his Memorandum of Points and Authorities (TR 10-14) did, in fact, cite cases which were pertinent to his claim that civil courts are authorized to review military procedures before a court martial to determine whether it acted within its powers. The civil courts have also the right to

review such process to determine whether or not the court-martial gave consideration to the Appellant's rights of due process.

Citing

Palomar v. Taylor, 344 F 2d 937 (CA 10, 1965);
Nelson v. Peckham, 210 F 2d 574 (CA 4, 1949);
Levin v. Gillespie, 121 F Supp 239 (1954); and
Burns v. Wilson, 346 US 137, 97 L Ed 1508,
 73 S Ct 1045 (1953).

All these cases stand for the proposition that when the Army acts in excess of its legal authority or denies or threatens to deny due process, federal courts have jurisdiction.

Appellant presented sufficient allegations to show that the issues involved in his case are going far beyond those essentials which are required to maintain discipline among the military forces.

In *Toth v. Quarles*, 350 US 11, 100 L Ed 8, 76 S Ct (1955), the Supreme Court teaches that

“Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.”

The allegations of the complaint, which allegations were not denied, clearly indicate that the issues presented

“... arise under the Constitution and laws of the United States.”

and that, therefore, under 28 USC 1331, the federal courts have jurisdiction.

Appellant submits that the issues presented by the complaint and by the Return of Appellee to Order to Show Cause and the cases cited by him in his Memorandum of Law, indicated that the federal courts have jurisdiction. That such jurisdiction is a necessity to prevent military personnel from being deprived of constitutional rights was recently held by the United States Court of Military Appeals in the case of *United States, Appellee v. Michael L. Tempia*, Appellant under 19815, decided on April 25, 1967. The decision in that case answers the inquiry whether the principles enunciated by the Supreme Court of the United States in *Miranda v. Arizona*, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602 (1966) applied to military interrogations of criminal suspects. The Court of Military Appeals held that they do. Judge Ferguson, who wrote the opinion of the Court, emphasized that

“The time is long since past—as indeed, the United States recognizes—when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights.”

While recognizing

“That military law exists and has developed separately from other Federal law . . .”

the opinion states that such separate development

“. . . does not mean that persons subject thereto are denied their constitutional rights. To the contrary, the very issue before the Supreme Court in *Burns v. Wilson*, *supra*, was whether such a denial had occurred.”

In the *Burns* case, Judge Ferguson held that

“The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights.”

The *Tempia* case stated that

“The impact of *Burns v. Wilson*, supra, then, is of an unequivocal holding by the Supreme Court that the protections of the Constitution are available to servicemen in military trials.”

The *Tempia* case refers back to *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244, wherein the Court of Military Appeals said

“... (I)t is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces. (Citing *Burns v. Wilson*, 346 US 137, 73 S Ct 1045, 97 L ed 1508 (1953); *Shapiro v. United States*, 107 Ct Cl 650, 69 F Supp 205 (1947); *United States v. Hiatt*, 141 F 2d 664 (CA 3d Cir) (1944).)”

The *Tempia* opinion also reminds us that the Court of Military Appeals in *United States v. Culp*, 14 USCMA 199, 33 CMR 411, Judge Kilday said

“I agree, thoroughly and completely, with the view that members of the military are not shorn of their constitutional rights while they remain in the military service.”

The Chief Judge then noted that

“It has long been my position that service personnel ‘are entitled to the rights and privileges

secured to all under the Constitution of the United States, unless excluded directly or by necessary implication, by the provisions of the Constitution itself.' ”

Judge Ferguson in the *Culp* case stated his opinion to the effect that

“ . . . the Sixth Amendment, insofar as it pertains to the right of counsel, applies in trials by court-martial.”

Appellant submits that pursuant to the holding in the *Tempia* case, the command of the Sixth Amendment applies to courts-martial, and that in consequence, the right to the protection of the Fifth Amendment against double jeopardy similarly applies. This is underlined when the opinion in *Tempia* establishes the Court's

“ . . . firm and unshakeable conviction that Tempia, as any other member of the armed services so situated, was entitled to the protection of the Bill of Rights . . . ”

The thrust of Appellant's complaint was that he is entitled to declaratory relief to be issued from the United States District Court because the threatened court-martial was to try him the third time for the self-same offense, contrary to the command of the Fifth Amendment of the United States Constitution.

The Trial Court erred when it held that such relief is not available to Appellant, and further erred when it held that the federal courts lack jurisdiction over

the issues presented. The decision was in effect saying that an enlisted man must rely on the court martial for protection in constitutional rights. However, as *Tempia* teaches

“... the military picture . . .”

is not as rosy as it is painted

“What does concern us is our duty to follow the interpretation by the Supreme Court of the Constitution of the United States . . .”

Judge Kilday, in his concurring opinion, pointed out that

“Article 76, Uniform Code of Military Justice, 10 USC Para 876, notwithstanding, it has long been obvious that court-martial proceedings are open to examination by civil courts . . . The scope of such review has, in recent years, been extended to queries regarding an accused’s constitutional rights. *Burns v. Wilson*, 346 US 137, 97 L ed 1508, 73 S Ct 1045 (1953); *Gusik v. Schilder*, 340 US 128, 95 L ed 146, 71 S Ct 149 (1950). This may involve due process and specific constitutional guarantees. In *United States v. Hiatt*, 141 F 2d 664, 666 (CA 3d Cir) (1944), that court first pointed out that basic guarantees of fairness afforded by the due process clause of the Fifth Amendment applied to a defendant in a criminal proceeding in a military court. It thereupon concluded, ‘it is open for a civil court in a habeas corpus proceeding to consider whether the circumstances of a court-martial proceeding and the manner in which it was conducted ran afoul of the basic standard of fairness which is involved in the constitutional concept of due process

of law and, if it so finds, to declare that the relator has been deprived of his liberty in violation of the fifth amendment and to discharge him from custody.’ ”

Judge Kilday cites *Gallagher v. Quinn*, 363 F 2d 301 (CA DC Cir) (1966) wherein the order of the District Court dismissing a complaint for a mandatory injunction was affirmed, nevertheless, that Circuit Court concluded that the District Court had jurisdiction as a matter of due process to review the procedure under the Uniform Code. In that case the Court of Appeals observed

“ ‘. . . though greater latitude respecting due process is allowed military tribunals, due process is requisite. *Burns v. Wilson*, supra n. 2. And the right to due process would be lost if one deprived of it could not obtain redress because not in confinement.

“ ‘The Supreme Court is the final arbiter of due process under the Constitution. The Supreme Court has not been granted jurisdiction to review either on direct appeal or by certiorari a decision of the Court of Military Appeals. The consequence is that unless jurisdiction lies in the District Court in such a case as this, with appellate jurisdiction in this court and then in the Supreme Court, the constitutional validity of the Act of Congress cannot be decided except by the military tribunal. The “separate and apart” military law jurisprudence, referred to in those terms in *Burns v. Wilson*, supra n. 2, at 140, would appear not to be separated so far from possible Supreme Court scrutiny.’ ”

Judge Kilday in the *Tempia* case reminds us that in *Shapiro v. United States*, 107 Ct Cl 650, 69 F Supp 205 (1947), it was held that the Fifth and Sixth Amendments applied to military tribunals as well as to civil courts. He underlines the basic reason why federal courts have jurisdiction when the issues are of constitutional dimension by citing from *Gallagher v. Quinn* (supra) to the effect

“... unless jurisdiction lies in the District Court in such a case as this, with appellate jurisdiction in this court and then in the Supreme Court, the constitutional validity of the Act of Congress cannot be decided except by the military tribunal.” (Emphasis supplied.)

That such ought not be and is not the case was stated by the Supreme Court of the United States in *Burns v. Wilson* (supra) wherein the Court held that the issue where a denial of constitutional right occurred is within the jurisdiction of the Court.

The Trial Court erred in denying its own jurisdiction because the issues presented were clearly of constitutional dimension and it was incumbent upon the Trial Court to determine the merits of the case. Its refusal to do so requires reversal.

(2) PURSUANT TO THE JURISDICTION, DECLARATORY RELIEF SHOULD HAVE BEEN GRANTED.

The complaint clearly delineated the issues to the effect that Appellant became a conscientious objector to participation in war in any form after he joined

the Armed Forces. Regulation AR 635-20 provides for an administrative discharge of those in the posture of the Appellant. It was alleged that his request for administrative discharge pursuant to the above regulation was denied contrary to law, and that therefore, he is entitled to a declaration of his right to such discharge.

The complaint also set forth that Appellant was theretofore twice court-martialed because of his inability to comply with an order to participate in preparation for war. It was also set forth that he is threatened with a third court-martial for the identical same offense—the offense being that having informed his chain in command that because of religious training and belief, he cannot conscientiously participate in serving in the military. But notwithstanding of such information, an order was given to him which to carry out would have violated his conscience, and for conscientious reasons based on religious belief, he could not carry out an order and courts-martial and confinement followed.

The Appellant claimed that the second and the threatened third court-martial put him in multiple jeopardy contrary to the Fifth Amendment of the United States Constitution. It was incumbent then upon the Trial Court to examine into the merits of the case so that the constitutionally declared rights may be protected.

50 USC 456 (j) provides that

“Nothing contained in this Title shall be construed to require any person to be subject to com-

batant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.”

The allegations of the complaint clearly brought Appellant within the purview of the above law and the right thereunder should have been declared by the Trial Court.

The United States Court of Military Appeals in *John L. Gale*, Petitioner *v. United States*, Respondent, Miscellaneous Docket No. 67-2, decided on May 12, 1967, held that that Court has the jurisdiction, even though limited by law, to grant extraordinary remedies in cases involving constitutional rights. There the Court held that

“... in an appropriate case, this Court clearly possesses the power to grant relief to an accused prior to the completion of court-martial proceedings against him. To hold otherwise would mean that, in every instance and despite the appearance of prejudicial and oppressive measures, he would have to pursue the lengthy trial of appellate review—perhaps even serving a long term of confinement—before securing ultimate relief. We cannot believe Congress, in revolutionizing military justice and creating for the first time in the armed services a supreme civilian court in the image of the normal Federal judicial system, intended it not to exercise power to grant relief on an extraordinary basis, when the circumstances so require.”

As in the *Gale* case, Appellant submits here that it is not to be believed that Congress intended the Fed-

eral District Court not to exercise power to grant relief when the circumstances so require. The circumstances here required the granting of the relief and the refusal to do so requires reversal.

(3) APPELLANT'S RIGHT NOT TO BE PUT INTO MULTIPLE JEOPARDY IS OF CONSTITUTIONAL DIMENSION, THE VIOLATION OF WHICH PLACES THE ISSUE WITHIN THE JURISDICTION OF THE FEDERAL COURTS.

Appellant submits that the Fifth Amendment proscribes double jeopardy and that such proscription binds both the civil and military authorities. While it is true that in *Wade v. Hunter*, 336 US 684, 69 S Ct 834 (1949), it was held that a reconvening of a court martial which was interrupted in the first instance by the threat of a German invasion, did not put *Wade* into double jeopardy, nevertheless, the Court left no doubt as to the applicability of the Fifth Amendment prohibition against placing a person twice in jeopardy of life or limb when the offense charged is the same. The *Tempia* case, we believe, put to rest any doubt as to the obligation of the military courts to respect constitutional rights and protect them. The complainant clearly stated that Appellant's second court-martial and the threatened third court-martial both were to punish him for the same offense in disregard of the Fifth Amendment to the Constitution. The Supreme Court of the United States repeatedly went on record to protect an accused who was threatened with multiple trials for the same offense. Justice Black, in

dissenting in *Barkus v. Illinois*, 359 US 121, 79 S Ct 576 (1959) pointed out that:

“Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times.”

In an ancient case, *Ex Parte Ulrich*, 42 F 587 (1890), it was said that

“... in following the direction of the Supreme Court, we will find no principle of the common law, grounded upon the great rock of the Magna Charta, more firmly rooted than that no man shall be twice vexed with prosecutions for the same offense.”

The issue is not whether the three orders were given by three different officers, nor is it the question whether the three orders were given separated by six months' time lapse—the issue is whether the orders given to Appellant were of such character that obedience thereto would have been contrary to the conscientious scruples that he had towards participation in war and in preparation therefor. By the latter yardstick, the orders were the same, the refusals were grounded on the same religious belief, and in consequence, the offenses were the same, and being tried for it three times put the Appellant in multiple jeopardy.

In *In re Stubbs*, 122 F 1012 (1905) it was held that Stubbs was not put into double jeopardy because

“... the elements constituting the offense charged (were) radically different ...”

In the instant case, they were neither radically, or otherwise, different, but, in effect, were identical as they were in *In re Nielsen*, 131 US 176 (1889) where the Court held that a single offense was involved because there was a continuity over the period of which the second offense was supposed to have taken place. In Appellant's case, the elements of the offense were identical and the offense, or offenses, were extended over a period of his three courts-martial. Therefore according to the teachings of *In re Nielsen*, he has been subject to triple jeopardy and triple punishment.

The Trial Court should have inquired into the merits of the allegation as to multiple jeopardy, and failing to do so, it erred to the prejudice of Appellant and therefore, a reversal is required because

“If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. . . . The common law not only prohibited a second punishment for the same offense, but it went further, and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.” *Ex Parte Lange*, 18 Wall. 163 (1874).

4) APPELLANT'S RIGHT NOT TO BE COMPELLED TO PARTICIPATE IN WAR CONTRARY TO HIS RELIGIOUS TRAINING AND BELIEF IS SIMILARLY OF CONSTITUTIONAL DIMENSION AND THE JURISDICTION OF THE FEDERAL COURT EXTENDS OVER THE ISSUES.

50 USC 456 (j) grants a right or at least the "grace" to Appellant not to be compelled to participate in war if such participation is contrary to his religious training and belief. The allegations of the complaint clearly put him within the purview of the above law, which law is bottomed on the recognition by Congress that the First Amendment to the United States Constitution cannot deprive one of the free exercise of his religion.

But the right or as it is sometimes said, solely a "grace" granted to conscientious objectors to be exempt from military service, in any case, may not deprive Appellant of such right or such "grace" just because he is a member of the Armed Forces. This was recognized by the Army when it adopted AR 35-20, and particularly, subparagraph 3a thereof. *Tempia* teaches us that rights (or even grace) of constitutional dimensions must be respected by military courts. The two past courts-martial and the threatened third one demonstrated that the court-martial failed to abide by the *Tempia* decision, and therefore, the Trial Court should have determined the issues on the merits and having failed to do so, requires a reversal.

- (5) THE RELIEF PRAYED FOR IN THE COMPLAINT SHOULD HAVE BEEN GRANTED BY THE DISTRICT COURT, AND THIS COURT OUGHT TO ORDER THAT THE ISSUES BE TRIED ON THE MERITS.

The complaint prayed that the Trial Court declare that the threatened third court-martial is illegal because the Appellant will be tried the third time for his inability to participate in military activities, which inability results from his conscientious objection to war and to preparation therefor based on his religious training. The complaint also prayed for declaration by the Trial Court that the Appellant is entitled to separation from military service pursuant to AR 635-20 and the allegations as they were set forth in the prescribed form DA 1049. The Trial Court also asked that the Commanding General of Fort Ord Major General R. G. Fergusson, who was the convening authority of the courts-martial (and who is now succeeded by Major General Thomas A. Kenan who became Commanding General of Fort Ord subsequent to the filing of this appeal) be restrained from ordering Appellant to be tried before a court-martial for his conscientious inability to participate in military activities because of his religious training and belief.

The allegations of the complaint setting forth the threat to Appellant's constitutional rights presented a clear mandate to the Trial Court to grant the relief prayed for. The relief should have been granted because the orders disobeyed by Appellant were not such as were authorized—under the circumstances prevailing—to be given to him. Article 90 of the Uniform Code of Military Justice, subparagraph (b)

describes the offense charged against the Appellant under the heading, "Disobeying Superior Officer." The discussion thereunder states that

"The willful disobedience contemplated is such as shows an intentional defiance of authority . . ."

It also states that

"The order must relate to military duty and be one which the superior officer is authorized under the circumstances to give the accused. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article."

In the face of the undenied allegations of the complaint, the threatened third court-martial involved no intentional defiance of the authority, but rather a defiance, if defiance it be, brought about by religious compunction. The order was not such which any officer in the chain of command who was informed—as they all were—of Appellant's conscientious objection authorized under those circumstances to be given. In face of the information given to the chain of command as to the religious posture of Appellant, it could not have been expected but that he will refuse to carry out the order. Therefore, the order was given for the sole purpose of creating an offense which was under all circumstances to be expected that he must commit.

The Trial Court erred in dismissing the complaint and refusing to hear the issues on their merits, and therefore a reversal is required.

Reversal is also required because the two

“... court-martial proceedings and the manner in which it was (they were) conducted ran afoul of the basic standards of fairness which is involved in the constitutional concept of due process of law.”

Due process was often defined but probably never better than when the Supreme Court said, speaking through Justice Frankfurter, that this term is a

“... compendious expression for all those rights which the courts must enforce because they are basic to our free society.” *Wolf v. People of the State of Colorado*, 338 US 25, 69 S Ct 1359.

If the two courts-martial are a yardstick for the third, which Appellant fears it is, then the threatened court-martial will deny him of due process even though due process “... is basic to our free society.

V

CONCLUSION

Appellant submits that because of the constitutional dimensions of the rights involved in the instant case, the Trial Court had jurisdiction of the subject matter and within its jurisdiction the prayer of the complaint should have been granted. The refusal to do so requires a reversal and the Appellant prays that an order may be entered upon the Trial Court to proceed with the hearing of the case on its merits.

Dated, Carmel, California,
August 28, 1967.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANCIS HEISLER,
Attorney for Appellant.

NO. 21,944

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PVT. FELIX CHAVEZ, JR.,

Appellant,

v.

MAJOR GENERAL R. G. FERGUSSON,
U. S. Army, Commanding General,
Fort Ord, California,

Appellee.

APPELLEE'S BRIEF

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Appellee.

APPELLEE'S BRIEF

JURISDICTION

The action was commenced in the United States District Court, by the filing of a complaint for declaratory judgment and for injunction. It sought to invoke the jurisdiction of the District Court under 28 USC 1331 and 28 USC 2201. The jurisdiction of this Court is asserted under 28 USC 1291.

The District Court issued an order to show cause, directing the respondents to show cause why the defendant should not be enjoined and restrained from compelling plaintiff to be tried before a court-martial during the pendency of this action. The defendants filed a return to the order to show cause which stated as grounds to dismiss the action, one, the complaint did not state a claim upon which relief could be granted, two, that the Court did not have jurisdiction of the subject matter, and three, that there was absent an indispensable party, to-wit, the Secretary of the Army; also, four, that there are administrative remedies of review and appeal. The Court heard the matter as a motion to dismiss as well as an application for injunction.

The District Court observed that no authority had been advanced by the plaintiff for the proposition that the Army lacks jurisdiction to court-martial for disobeying orders an enlisted soldier

who has made the claim that he is a conscientious objector, and in the absence of such authority, the Court concluded that defendant is acting within the scope of his jurisdiction.

With respect to the claim that plaintiff was entitled to declaratory judgment of separation from the military service, the Court stated it believed it was without jurisdiction to entertain such a matter.

On March 30, 1967, the Court ordered that the order to show cause be discharged, and that the action be dismissed.

Appellant, under the caption as plaintiff, thereafter, on April 25, 1967, filed in this Court a motion for a restraining order, together with a memorandum of authorities and an affidavit of the appellant. These documents were docketed as Court of Appeals number 21,794. Service was not effected on appellee. On April 26 the motion was denied.

This proceeding does not appear as a part of the record in this case, nor is it mentioned by appellant. Also not appearing as part of the record in either case is the fact that appellant was tried by court-martial following the denial of the restraining order, and was convicted on April 26, 1967. Review of the court-martial findings is now pending before the Board of Military Review in Washington. (Affidavit of Francis Heisler attached to motion to vacate order.) These matters are also set forth in appellee's motion to dismiss the appeal.

THE FACTS IN THIS CASE

The facts in this case must be derived from plaintiff's complaint in the United States District Court. He alleges that he was born in Los Angeles on March 23, 1944; that he graduated from high school in 1961, and enlisted in the United States Army Reserve in June 1965 for a period of six years. He went on active duty at Fort Ord, California, on

September 10, 1965. The complaint alleges that he became a conscientious objector to war in any form in October 1965 at Fort Ord. He refused to salute any officer and refused to train. On November 17, 1965 he was ordered to be tried before a court-martial. He was tried and convicted and sentenced to the stockade for six months. The confinement was terminated in April 1966. He again refused to obey orders, and a second court-martial was ordered, and he was tried on June 3, 1966. He was also found guilty and was sentenced to six months in the stockade. In April 1966 plaintiff had filed a DA form 1049 pursuant to Army regulations AR 635-20, requesting discharge as a conscientious objector. This application was denied during the time he was serving his sentence on the second court-martial. Following his release from the stockade he for the third time disobeyed orders, and on December 2, 1966 charges and specifications were filed against him.

He alleges in his complaint that having become a conscientious objector to war in any form, he could not conscientiously comply with any orders to be given to him, nor could he in accordance with his teachings salute any officer, nor could he participate in any military training in preparation for war. On this basis he refused to salute his officer and refused to train, and was ordered court-martialed.

Now, appellant contends that by reason of his asserted conscientious objection, the acts of the appellee causing him to be court-martialed three times are unlawful.

Appellant contends that AR 635-20 authorizes and requires the appellee to discharge from military service an enlisted man such as appellant, who is a bona-fide conscientious objector; that there is no basis in fact for appellee's refusal so to discharge the appellant; and that said refusal in his behalf, and ordering him to be tried before a court-martial for his conscientious inability to participate in

combat training is unlawful, and that this Court should declare that appellant is entitled to separation from military service pursuant to AR 635-20.

It is quite clear from the foregoing that the appellant voluntarily enlisted and committed himself for a period of six years; that during the course of this enlistment he developed what he calls a conscientious objection to war in all forms, and that because of this conscientious objection he is not going to accept any orders from his superiors; that in pursuing this course of action he three times deliberately refused orders and as a result was court-martialed. It also appears clearly that he was aware of the existence of Army Regulation 635-20, and did make an application under said regulation by utilizing Form 1049 and requesting discharge thereby. This application was submitted through regular channels and was denied. Notwithstanding the denial, the appellant persisted in his own judgment as to what he was going to do and what he was not

going to do, which in effect was a complete repudiation of the obligation that he undertook when he enlisted, and the oath taken at that time.

SPECIFICATION OF ERRORS

In considering the appellant's specification of errors, it must be born in mind that following the dismissal of the action by the District Court, appellant did institute what appears to be a separate proceeding in this Court, by filing a motion for an injunction, and asking the Court for an order to show cause or for an order enjoining the appellee from conducting the third court-martial.

From the Specification of Errors, the appellee extracts the following as possibly the issues which the appellant would present to this Court: first, that because of claim to conscientious objection, appellant has the right to refuse to obey any orders, and that the resulting court-martials which follow such refusal constitute a multiple jeopardy in a constitutional sense; second, that he

has a constitutional right to discharge because of his conscientious objection.

Under the next heading, Argument, appellant specifies as the first subdivision that the United States District Court has jurisdiction over the subject matter. Under this subdivision, he quotes from the Trial Court's Memorandum and Order as follows:

"No authority has been advanced by plaintiff for the proposition that the Army lacks jurisdiction to court-martial for disobeying orders an enlisted soldier who has made the claim that he is a conscientious objector. In the absence of such authority, this Court can only conclude that the defendant is acting within the scope of his jurisdiction."

Appellant, following the quotation, then makes the statement that he believes his memorandum of points and authorities did in fact cite cases which were pertinent to his claim, that civil courts are authorized to review military procedures before court-martial to determine whether it acted within its powers.

ARGUMENT

I. There is no constitutional right to relief from the obligation to bear arms because of conscientious objection.

This contention was made in U. S. v.

Macintosh, 283 US 605, to which the Court replied, page 623:

"This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him."

Wood v. U. S. (5 Cir.)
373 F.2d 694

George v. U. S. (9 Cir.)
196 F.2d 445

Storey v. U. S. (9 Cir.)
370 F.2d 255

Korte v. U. S. (9 Cir.)
260 F.2d 633,
Cert. den. 358 US 928

Petition of Green
195 F.Supp. 174
264 F.2d 63 (9 Cir.)

Appellant's status is that of an enlisted man. The Supreme Court in In re Quinley, 137 US 147, clearly identified this status, pp. 151, 152:

"Enlistment is a contract; but it is one of those contracts which changes the status; * * * By enlistment the citizen becomes a soldier * * * He cannot of his own volition throw off the garments he has once put on, * * * "

Bull v. U. S.
366 US 393

Power to discharge enlisted members before their term of service expires is expressly granted to the Secretary of the Army.

10 USC 3811.

Exemption from military service on religious grounds is a matter of legislative grace.

Storow v. U. S., supra

Flaming v. U. S. (10 Cir.)
344 F.2d 912

Clark v. U. S. (9 Cir.)
236 F.2d 13

Korte v. U. S., supra

Congress in the Selective Service Act

(50 USC[App.]456j) has provided as follows:

"(j) Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

This section was amended by Congress on June 30, 1967

(Public Law 90-40) to delete the words "in a relation to a Supreme Being involving duties superior to those arising from any human relation".

The Department of Defense as a matter of policy promulgated Department of Defense Directive 1300.6:

"III. POLICY.

- A. No vested right exists for any individual to be discharged from military service at his own request before the expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative discharge prior to the completion of his term of service is discretionary with the service concerned, based on judgment of the facts and circumstances in the case.

"B. The fact of conscientious objection does not exempt men from the draft; however, the Congress has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces, and accordingly has recognized bona fide religious objection to participation in war, in any form, to the extent that such an objector (1-O classification) is not inducted into the Armed Forces but is required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest under a prescribed Alternate Service Plan (Conscientious Objectors' Work Program). Consistent with this national policy, bona fide conscientious objection by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable."

Implementing the DOD 1300.6, the Department of the Army promulgated AR 635-20 and AR 135-25, applicable to personnel in the active military service, and personnel in the Reserve. AR 635-20 states:

"3. POLICY. a. Consideration will be given to requests for separation based on conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the active military service.

* * * * *

"c. All requests for discharge based on conscientious objection will be considered on an individual basis in accordance with the facts and special circumstances in a particular case."

II. There is no authority which compels discharge, nor is there any authority that relieves an enlisted man from the performance of his duty and accords to him the right of disobedience.

Fleming v. U. S., supra

Clark v. U. S., supra

Storey v. U. S., supra

Korte v. U. S., supra

Courts cannot review and determine validity of military assignments to duty.

Orloff v. Willoughby
345 US 83, 94

Noyd v. McNamara
267 F.Supp. 701
378 F.2d 538 (10 Cir.)

Brown v. McNamara
263 F.Supp. 686

Petition of Green, supra

Federal Courts will not issue a writ of prohibition or otherwise review the acts of a court-martial unless it appears that it is acting in excess of its jurisdiction.

Burns v. Wilson
346 US 137

Smith v. Whitney
116 US 167

Noyd v. McNamara, supra

CONCLUSION

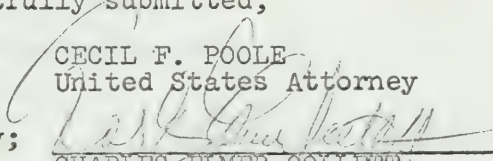
From the facts of this case, appellant's course of conduct is clear--wilful disobedience of orders. He demands a discharge. His alternative is refusal to obey orders. The ultimate resolution is a discharge by court-martial order. Appellee fails to see any standing in this Court. Appellant's court-martial is now before the Board of Review. It may reach the Court of Military Appeals.

Copy of Army Regulation No. 635-20 is attached as Appendix I, and copy of DOD 1300.6 as Appendix II.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

By;

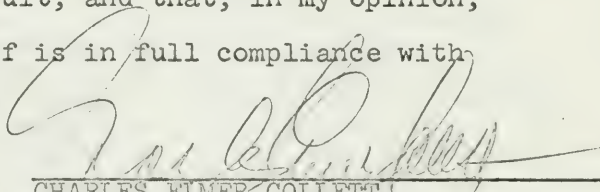

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Attorneys for Appellee

DATED: November 28, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



CHARLES ELMER COLLETT
Chief Assistant United States Attorney

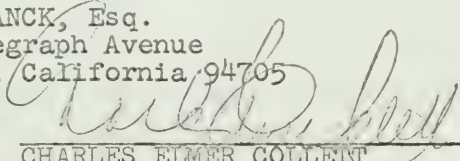
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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that copies of the foregoing Appellee's Brief were served upon petitioner by depositing the same in the United States mail at 450 Golden Gate Avenue, San Francisco, California, addressed to the Attorneys for the Petitioner,

FRANCIS HEISLER, Esq.
Heisler & Stewart
Post Office Drawer 3996
Carmel, California 93921

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CHARLES ELMER COLLETT
Chief Assistant United States Attorney

DATED:
November 28, 1967.

PERSONNEL SEPARATIONS
CONSCIENTIOUS OBJECTION

	Paragraph
Purpose.....	1
Scope.....	2
Policy.....	3
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1. Purpose. This regulation sets forth the policy, criteria, and procedures for disposition of military personnel who, by reason of religious training and belief, claim conscientious objection to participation in war in any form.

2. Scope. This regulation applies equally to commissioned officers, warrant officers, and enlisted personnel in the active military service.

3. Policy. *a.* Consideration will be given to requests for separation based on conscientious objection to participation in war, in any form, when such objection develops subsequent to entry into the active military service.

b. Requests for discharge will not be entertained when based solely on conscientious objection which existed, but which was not claimed prior to induction, enlistment, or entry on active duty or active duty for training. Similarly, requests for discharge will not be entertained when based solely on conscientious objection claimed and denied by the Selective Service prior to induction.

c. All requests for discharge based on conscientious objection will be considered on an individual basis in accordance with the facts and special circumstances in a particular case.

d. Final determination will be made at Headquarters, Department of the Army, on all requests for discharge based on conscientious objection.

4. Procedure. *a.* Military personnel will submit applications for discharge by reason of conscientious objection on DA Form 1049 (Personnel Action) to their immediate commanding officers. The individual requesting discharge will include in his application or as an inclosure thereto the

information indicated below as the minimum required for consideration of his request. The individual may submit such other information as desired.

(1) General information.

- (a) Full name.
- (b) Military service number.
- (c) Selective service number.
- (d) Service address.
- (e) Permanent home address.
- (f) Give the name and address of each school and college which you have attended, together with the dates of your attendance, and state in each instance the type of school (public, church, military, commercial, etc.).
- (g) Give a chronological list of all occupations, positions, jobs, or type of work other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the type of work, name of employer, address of employer, and the from/to date for each position or job held.
- (h) Give all addresses and dates of residence where you have formerly lived.
- (i) Give the name and address of your parents and indicate whether they are living or deceased.
- (j) State the religious denomination of sect of your father and mother.
- (k) Did you apply to the Selective Service System (Local Board) for classification as a conscientious objector prior

*This regulation supersedes AR 635-20, 9 November 1962, and rescinds DA message 742770, 4 December 1965.

to entry into the Armed Forces? To which local board? What decision was made by the Board, if known?

- (1) If you have served less than 180 days in the military service and are discharged as a conscientious objector, are you willing to perform work under the Selective Service Conscientious Objectors' Work Program? Yes ____ No ____ Will you consent to the issuance of an order for such work by your Local Selective Service Board? Yes ____ No ____

(2) Religious training and belief.

- (a) Do you believe in a Supreme Being?
(b) Describe the nature of your belief that is the basis of your claim, and state whether or not your belief in a Supreme Being involves duties that to you are superior to those arising from any human relation.
(c) Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim.
(d) Give the name and present address of the individual upon whom you rely most for religious guidance.
(e) Under what circumstances, if any, do you believe in the use of force?
(f) Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.
(g) Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim? If so, specify when and where.

3) Participation in organizations.

- (a) Have you ever been a member of any military organization or establishment before entering the Armed Forces for this tour? If so, state the name and address of same and give reasons why you became a member.
(b) Are you a member of a religious sect or organization? If your reply is "yes"—

1. State the name of the sect, and the

name and location of its governing body or head if known to you.

2. When, where, and how did you become a member of said sect or organization.
3. State the name and location of the church, congregation, or meeting where you customarily attend.
4. Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting.
5. Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.
(c) Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.
(4) References. Give the name, full address, occupation or position, and relationship to you, concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

b. Immediately upon receipt of a request for discharge on the grounds of conscientious objection, the individual's commanding officer will fully advise and counsel him concerning the provisions of Section 3103, Title 38, United States Code. That section provides, in pertinent part, that the discharge of a person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, will bar all rights (except Government insurance) of such person under laws administered by the Veterans Administration based upon the period of service from which discharged or dismissed. The only exception is in the cases in which it is established, to the satisfaction of the Administrator, that the member was insane. After counseling, the member will be required to sign and date the following statement:

I have been counseled concerning possible non-entitlement to benefits administered by the Veterans Administration due to discharge from the military service as a conscientious objector. I understand that a discharge as a conscientious objector who refuses to perform satisfac-

tory military duty or otherwise comply with lawful orders of competent military authority may bar all rights based upon the period of service from which discharged, under any laws administered by the Veterans Administration except my legal entitlement (if any) to any war risk, Government (converted) or National Service Life Insurance.

c. An individual requesting discharge will receive a counseling interview by a chaplain and a psychiatric interview by a psychiatrist (or medical officer if a psychiatrist is not available). The chaplain will submit a report of the interview to include the sincerity of the individual in his belief and an opinion as to whether the individual's objection to military duty is based on his religious beliefs. The psychiatrist will submit a report of psychiatric evaluation indicating the presence or absence of any psychiatric disorder which would warrant treatment or disposition through medical channels.

d. The application for discharge, together with the inclosure(s), and reports of interviews, will be forwarded through military channels to The Adjutant General, ATTN: AGPO, Department of the Army, Washington, D.C., 20315.

(1) The comment by unit commander on DA Form 1049 will include the following information:

- (a) Whether approval or disapproval is recommended. The reason(s) therefor will be included.
- (b) Duty and primary MOS (enlisted personnel only).
- (c) Whether medical board or physical evaluation board proceedings are pending or appropriate.
- (d) Whether under investigation, under charges, awaiting result of trial, absent without leave, or whether any flagging action has been taken in accordance with AR 600-31.

(2) Subsequent forwarding comments on DA Form 1049 will include recommendation for approval or disapproval and any other remarks that may be pertinent.

[AGPO]

e. The Adjutant General, Department of the Army, will coordinate with the Selective Service System.

5. **Assignment.** An individual requesting discharge based on conscientious objection will be retained in his unit and assigned duties providing the minimum conflict with his professed beliefs pending a final decision on his application.

6. **Discharge of personnel having less than 180 days service.** Personnel who have less than 180 days service when discharged will be discharged by reason of conscientious objection to permit service in the Conscientious Objectors' Work Program. National Headquarters, Selective Service System, 451 Indiana Avenue NW., Washington, D.C., 20435, will be notified promptly of date of discharge from military service; advised that the individual has not completed 180 days active duty, and requested to induct the individual into the Selective Service Conscientious Objectors' Work Program.

7. **Authority.** a. *Commissioned officers and warrant officers.* Authority AR 635-20 and SPN 558 for separation will be included in orders announcing discharge of individuals.

b. *Enlisted personnel.* Authority AR 635-20 and SPN 318 for discharge will be included in directives or orders directing individuals to report to the appropriate transfer activity or unit personnel section designated to accomplish transfer processing for discharge.

8. **Form of separation certificates.** a. *Discharge.* An Honorable Discharge Certificate (DD Form 256A) or a General Discharge Certificate (DD Form 257A) will be furnished. Commissioned officers and warrant officers will be furnished a discharge certificate in accordance with AR 635-5 or as directed by Headquarters, Department of the Army. Enlisted personnel will be furnished a discharge certificate in accordance with AR 635-200.

b. *Report of separation.* Armed Forces of the United States Report of Transfer or Discharge (DD Form 214) will be furnished each individual discharged from service under this regulation.

By Order of the Secretary of the Army:

HAROLD K. JOHNSON,
General, United States Army,
Chief of Staff.

Official:

I. C. LAMBERT,
Major General, United States Army,
The Adjutant General.

Distribution:

To be distributed in accordance with DA Form 12-9 requirements for Military Personnel Procedures, Officer and Enlisted:

Active Army: A. NG: D. USAR: None.

TAGO 1025A

U.S. GOVERNMENT PRINTING OFFICE: 1968



August 21, 1962
NUMBER 1300.6

ASD(M)

Department of Defense Directive

SUBJECT Utilization of Conscientious Objectors and Procedures
 for Processing Requests for Discharge Based on
 Conscientious Objection

References: (a) DoD Directive 1332.14, "Administrative Discharge"
(b) DoD Directive 1315.1, "Disposition of Conscientious
 Objectors," June 18, 1951 (cancelled herein)

I. PURPOSE

This Directive establishes uniform procedures for the utilization of conscientious objectors in the Armed Forces and consideration of requests for discharge on the grounds of conscientious objection.

II. APPLICABILITY

The policies and procedures set forth herein apply to all personnel of the Army, Navy, Air Force and Marine Corps and to all Reserve components thereof.

III. POLICY

- A. No vested right exists for any individual to be discharged from military service at his own request before the expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative discharge prior to the completion of his term of service is discretionary with the service concerned, based on judgment of the facts and circumstances in the case.
- B. The fact of conscientious objection does not exempt men from the draft; however, the Congress has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces, and accordingly has recognized bona fide religious objection

to participation in war, in any form, to the extent that such an objector (1-O classification) is not inducted into the Armed Forces but is required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest under a prescribed Alternate Service Plan (Conscientious Objectors' Work Program). Consistent with this national policy, bona fide conscientious objection by persons who are members of the Armed Forces will be recognized to the extent practicable and equitable.

- C. Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained.
- D. It is the policy of the Department of Defense that requests for discharge from the military service on the grounds of conscientious objection will be handled on an individual basis, with final determination made at the departmental headquarters of the individual's service in accordance with the facts and circumstances in the particular case and the criteria of this Directive. The type of discharge, if separation is deemed warranted, will be determined by the individual's military record, the standards set forth in reference (a), and the procedural guidelines herein.
- E. In evaluating requests for discharge based on conscientious objection, great care must be exercised to insure the sincerity of the claim. It is essential that discharge procedures of the services not invite or permit abuse by unscrupulous persons who seek to avoid all obligations on the grounds of religious belief. Claims of conscientious objection by all persons, whether existing before or after entering military service should be judged by the same standards.
- F. The standards used by the Selective Service System in determining 1-O or 1-A-0 classification of draft registrants prior to induction are considered appropriate for application to cases of servicemen who claim conscientious objection after entering military service. 1-A-0 classification permits induction into the military service and the inductee is required to perform duties as outlined in Section V.A. of this Directive. 1-O classification does not permit induction into military

service but does permit induction into the Alternate Service Plan (Conscientious Objectors' Work Program). In either of the classifications the registrant is required to fulfill his obligations under the UMT&S Act.

- G. In order to insure the maximum practicable uniformity among the services and between members of the same service, advisory opinion by the Selective Service that a classification of 1-O is appropriate will normally be a requisite for discharge or release of members with less than two years active service based on conscientious objection.

IV. CRITERIA

- A. The criteria for determining conscientious objection (other than the statutory requirement that the objection be religious, as opposed to personal or philosophical) are not absolute objective measurements which can be applied across the board, but are the result of extensive experience and practices which have been upheld in the Courts in connection with legal obligations for service. Among the factors considered are such items as membership in a peace church, training in home and church, the general demeanor and pattern of conduct of the individual, his employment in defense-connected activities, his participation in religious activities, and his credibility and the credibility of persons supporting his claim. In the case of servicemen not liable for induction after discharge because of having served 180 days or more, the individual's willingness to engage voluntarily in post-military work of the nature encompassed by the Alternate Service Plan of Selective Service may also be pertinent.
- B. While church membership and church tenets are relevant in determining conscientious objection, they are not compelling. The courts have held that mere membership in a religious group teaching conscientious objection is not an automatic basis for classification as a conscientious objector nor does membership in a group which does not require conscientious objection constitute an automatic basis for denying such classification. The law does not require affiliation with any particular group in order that an individual may be classified as a conscientious objector.
- C. Evaluation of the sincerity of a claim of conscientious objection requires objective consideration of professed belief not generally shared by persons in the military service. For that reason, particular care must be exercised not to deny bona fide convictions solely on the basis that the professed belief is incompatible with one's own.

- A. 1. Individuals inducted into the Service who have previously been classified as 1-A-O by local induction boards should be assigned to noncombatant service, which in accordance with the President's Executive Order No. 10028, dated January 13, 1949, is defined as:
- (a) service in any unit of the armed forces which is unarmed at all times;
 - (b) service in the medical department of any of the armed forces, wherever performed; or
 - (c) any other assignment the primary function of which does not require the use of arms in combat provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.
- "The term 'noncombatant training' shall mean any training which is not concerned with the study, use, or handling of arms or weapons."
2. Such persons, upon induction into the Service, shall be transferred to a training center, or station, for recruit training and shall be subject to all regular training, except the portions thereof specifically excepted by Executive Order No. 10028 quoted in A.1, above. Thereafter, upon completion of recruit training, they shall be transferred to Hospital Corps, or Medical Department, for further training, provided they meet the requirements therefor. Such men, because of assignment to medical units will not be allowed to avoid the important or hazardous duties which are the responsibility of all members of the medical organization. Any man who does not meet the requirements for this training, or who fails to complete the course, will be retained in the service and employed in noncombatant duties.
- B. Personnel who claim to be conscientious objectors and state that they were so classified by their local board but their records do not so indicate:
- 1. The Commanding Officer shall obtain a statement from the individual concerned and refer the case to the departmental headquarters of the individual's service for investigation and decision. The departmental headquarters will investigate the matter through Selective Service.

2. If it is determined that the man should have been classified as 1-A-O, but inadvertently was not so classified, the records will be corrected, and the Commanding Officer will be directed to correct his records accordingly. The man then will be processed as indicated in V.A. above.
3. If it is determined that no change in classification is warranted, the individual will be notified to this effect.
4. Upon first referring of the case, pending its decision, the individual should be retained at his command and employed in noncombatant duties.

- C. 1. Individuals requesting discharge for conscientious objection will submit information as required in Inclosure 1 and such other documentation of their cases as is deemed appropriate by the military department concerned. In order to preserve the maximum practicable uniformity of treatment for like cases, requests and supporting papers will be forwarded, together with any other pertinent information known to the immediate command, to departmental headquarters for individual determination of action on the basis of the facts and the special circumstances of each case.
2. Immediately upon receipt of a request for discharge on grounds of conscientious objection, the member will be fully advised and counselled concerning the provisions of Section 3103, Title 38, United States Code. That section provides, in pertinent part, that the discharge of any person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, shall bar all rights (except government insurance) of such person under laws administered by the Veterans Administration based upon the period of service from which discharged or dismissed. The only exception is in cases in which it is established, to the satisfaction of the Administrator, that the member was insane. After counselling, the member will be required to sign and date the statement appended hereto as Inclosure 2.
 3. Before making a determination concerning a possible discharge for conscientious objection in cases falling within the terms of Section III.G., the military department concerned will forward each case to the Director, Selective Service System, Washington 25, D.C., for an advisory opinion as to the individual's proper classification under the GWTAS Act. At the discretion of the military department concerned, advisory opinions may also be sought on members with two or more years service.

- D. 1. Individuals for whom 1-O classification is recommended by Selective Service will be ^{normally} considered for discharge by reason of their conscientious objection to military service.
2. Individuals for whom 1-A-O classification is recommended normally will not be considered for discharge for conscientious objection reasons, but will be reassigned to noncombatant duties as outlined in Section V.A. of this Directive. Individuals so reassigned will be required to sign and date the statement appended hereto as Inclosure 3.
3. Individuals for whom neither 1-O nor 1-A-O classification is recommended by Selective Service will be retained in military service, subject to normal duty assignments.
4. If, in the judgment of the commander concerned, any individual reassigned to noncombatant duties or returned to his normal duty assignment demonstrates or has previously demonstrated his inability or unwillingness to cooperate in a manner which constitutes the basis for disciplinary action, action will be taken as in the case of any other member of the military service who demonstrates similar behavior.
- E. 1. Individuals for whom 1-O classification is recommended by Selective Service will normally be discharged "For the Convenience of the Government." Conscientious objection will be cited as the supporting reason in order to avoid possible future confusion. Pending separation, the individual will be assigned duties providing the minimum conflict with his professed beliefs and will be required to maintain the same standards of performance and behavior as other personnel assigned to his unit.
2. Personnel with less than 180 days service (volunteers or inductees) who are determined to be bona fide conscientious objectors (1-O classification) and whose request for separation is made early enough so that discharge occurs prior to completion of 180 days active duty will be separated for the convenience of the government by reason of conscientious objection to permit service in the Conscientious Objectors' Work Program. In such cases, the Selective Service System will be promptly notified of the date of discharge from the military service, the fact that the individual has not completed 180 days active duty, and will be requested to "induct" the individuals for the alternate service provided by the UMT&S Act.

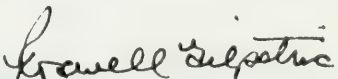
- F. Determination by the military department, in accordance with the facts of the case and the guidelines furnished herein, shall be final with respect to the administrative separation of its members.

VI. IMPLEMENTATION AND EFFECTIVE DATE

- A. All service regulations and policies in conflict with this Directive shall be cancelled immediately. Three copies of regulations implementing the policies contained herein will be furnished to the Assistant Secretary of Defense (Manpower) within 90 days from the date of publication of this Directive.
- B. This Directive is effective immediately.

VII. CANCELLATION

Reference (b) is hereby superseded and cancelled.


Deputy Secretary of Defense

Inclosures - 3

1. Required Information
2. Statement (counselling concerning VA benefits)
3. Statement (counselling concerning designation as conscientious objector)

Required Information

Each person seeking release from active service from the Armed Forces, as a conscientious objector, will provide the information indicated below as the minimum required for consideration of his request. This in no way bars the Military Departments from requiring additional information as they desire. The individual may submit such other information as desired.

A. General Information

1. Full name.
2. Military Serial Number.
3. Selective Service Number.
4. Service Address.
5. Permanent Home Address.

6. Give the name and address of each school and college which you have attended, together with the dates of your attendance, and state in each instance the type of school (public, church, military, commercial, etc.).

7. Give a chronological list of all occupations, positions, jobs, or type of work, other than as a student in school or college, in which you have at any time been engaged, whether for monetary compensation or not, giving the type of work, name of employer, address of employer and the from/to date for each position or job held.

8. Give all addresses and dates of residence where you have formerly lived.

9. Give the name and address of your parents and indicate whether they are living or deceased.

10. State the religious denomination or sect of your father and mother.

11. Did you apply to the Selective Service System (Local Board) for classification as a conscientious objector prior to entry into the Armed Forces? To which local board? What decision was made by the Board, if known?

12. If you have served less than 180 days in the military service and are discharged as a conscientious objector, are you willing to perform work under the Selective Service Conscientious Objectors' Work Program? Yes _____ No _____. Will you consent to the issuance of an order for such work by your Local Selective Service Board? Yes _____ No _____.

1. Religious Training and Belief.

1. Do you believe in a Supreme Being?
2. Describe the nature of your belief which is the basis of your claim, and state whether or not your belief in a Supreme Being involves duties which you are superior to those arising from any human relation.
3. Explain how, when, and from whom or from what source you received the training and acquired the belief which is the basis of your claim.
4. Give the name and present address of the individual upon whom you rely most for religious guidance.
5. Under what circumstances, if any, do you believe in the use of force?
6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrates the consistency and depth of your religious convictions.
7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim? If so, specify when and where.

2. Participation in Organizations.

1. Have you ever been a member of any military organization or establishment before entering the Armed Forces for this tour? If so, state the name and address of same and give reasons why you became a member.
2. Are you a member of a religious sect or organization? If your reply is "yes": -
 - a. State the name of the sect, and the name and location of its governing body or head if known to you.
 - b. When, where, and how did you become a member of said sect or organization?
 - c. State the name and location of the church, congregation, or meeting where you customarily attend.
 - d. Give the name, title, and present address of the pastor or leader of such church, congregation or meeting.
 - e. Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war.
3. Describe your relationships with and activities in all organizations in which you are or have been affiliated, other than military, political, or labor organizations.

D. References.

1. Give the name, full address, occupation or position, and relationship to you, concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

STATEMENT

I have been counselled concerning possible non-entitlement to benefits administered by the Veterans Administration due to discharge from the military service as a conscientious objector. I understand that a discharge as a conscientious objector, who refuses to perform satisfactory military duty or otherwise to comply with lawful orders of competent military authority, may bar all rights, based upon the period of service from which discharged, under any laws administered by the Veterans Administration except my legal entitlement (if any) to any war risk, government (converted) or National Service Life Insurance.

STATEMENT

I have been counselled concerning designation as a conscientious objector. Based on my religious training and belief, I consider myself to be a conscientious objector and am conscientiously opposed to participation in combatant training and service. I request assignment to noncombatant duties for the remainder of my term of service. I fully understand that on expiration of my current term of service I am not eligible for voluntary enlistment, reenlistment, or active service in the Armed Forces.

NO. 21, 944

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FT. FELIX CHAVEZ, JR.,)
)
Appellant,)
)
vs.)
)
)
)
MAJOR GENERAL R. G. FERGUSON,)
)
U.S. Army, Commanding General,)
)
Fort Ord, California,)
)
Appellee.)
)

APPELLANT'S REPLY BRIEF

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1
2
3
4 NO. 21, 944

5 IN THE UNITED STATES COURT OF APPEALS
6 FOR THE NINTH CIRCUIT
7

8 PVT. FELIX CHAVEZ, JR.,)
9 Appellant,)
0 vs.)
1 MAJOR GENERAL R. G. FERGUSON,)
2 U. S. Army, Commanding General,)
3 Fort Ord, California,)
4 Appellee.)

5 APPELLANT'S REPLY BRIEF

6 The Brief submitted by Appellee is striking because of the
7 demonstrated ability to sidestep the issues raised by Appellant in his
8 Opening Brief. Appellee's Brief is striking because neither in the recitation
9 of the Facts of the Case nor in the Specification of Errors, and last but not
0 least, in the Argument, the term due process of law does not appear once.
1 Appellee's Brief is further striking because it fails to discuss the important
2 issue raised as to the authority of the military to court martial Appellant
3 for the third time.

4 Appellee's Brief is striking because the Complaint, it self, as
5 summarized in our Opening Brief on pages 2 to 4, states that
6

1 "Appellant also claimed that Appellee was in-
2 formed of his inability to participate in
3 preparation for war, nevertheless, caused him
4 to be court-martialed twice and threatened with
5 a third one; thus depriving him of due process of
6 law." (emphasis ours)

7 Appellee, while not disagreeing with the Statement of the Case as
8 given by Appellant on pages 4 to 7 of the Opening Brief, chooses to
9 disregard it. On page 6 of the Opening Brief, it is claimed that Appellant

10 "...was entitled to separation and the denial of
11 such separation by the Appellee was illegal,
12 unconstitutional and void, and it was in clear
13 defiance of AR 635-20. It was also contrary to
14 the provisions of Title 50 USC 456 (j) pertaining
15 to conscientious objectors."

16 The Specification of Errors as given on pages 7 and 8 of Appellant's
17 Opening Brief are clear and concise, and the fact that Appellant

18 "...did institute what appears to be a separate
19 proceeding in this Court,..."

20 as set forth on page 8 of Appellee's Brief diminishes the issues presented
21 not at all.

22 Appellee's Argument, pages 10 to 15 of his Brief, repeats the
23 argument that was presented by him in his Motion to Dismiss Appeal. In
24 fact, the cases cited in said Motion with the exception of United States vs.
25 Macintosh, 283 US 605, Clark vs. United States (9th Cir.), 236 F 2d 13,
26 and Fleming vs. United States (10th Cir.), 344 F 2d 912, are taken into
27 Appellee's Brief substantially verbatim from the Motion to Dismiss Appeal.
28 Since Appellant's Opposition to Appellee's Motion to Dismiss Appeal
29 answered the references to those cases which were cited in the Motion to
30 Dismiss, we are not going to burden the Court by repeating our argument,

but will restrict ourselves to that of Appellee's argument which appears to be in addition to his Motion to Dismiss.

ARGUMENT

I

The reliance of Appellee upon United States vs. Macintosh, supra, is misplaced because of subsequent decisions of the Supreme Court. While Appellant claims, and we believe correctly, that because the issues are of constitutional dimension as interpreted by the United States Court of Military Appeals in United States vs. Tempia, CM 19815, Appellee fails to meet this thrust of our argument as it fails to meet the thrust that the threatened third court martial deprived Appellant of due process of law. Instead of this argument, Appellee seems to rely on United States vs. Macintosh. However, we believe that Girouard vs. United States, 328 US 61, 66 S Ct 826, clearly overruled the Macintosh case, as it overruled the companion cases, United States vs. Schwimmer, 279 US 644, 49 S Ct 448, and United States vs. Bland, 283 US 636, 51 S Ct 569.

Justice Douglas, who delivered the opinion of the Court in the Girouard case, stated that

"...the principle emerging from the three cases (meaning the Schwimmer, Macintosh, and Bland cases) obliterates any factual distinction among them. As we recognized in In re Summers, 325 U.S. 561, 572, 577, 65 S.Ct. 1307, 1313, 1316, they stand for the same general rule -- than an alien who refuses to bear arms will not be admitted to citizenship. As an original proposition, we could not agree with that rule. The fallacies underlying it were, we think demonstrated in the dissents of Mr. Justice Holmes in the Schwimmer case and of Mr. Chief Justice Hughes in the Macintosh case."

It appears to the Appellant that this wording clearly indicates that

the Macintosh case is no authority for the proposition advanced by the Appellee. In fact, Justice Douglas seems to hold the dissenting opinion of Chief Justice Hughes in the Macintosh case and of Justice Holmes in the Schwimmer case are the law pursuant to the Girouard decision. Chief Justice Hughes pointed out in the Macintosh case at page 633 that religious scruples against bearing arms have been recognized by Congress in the various draft laws. Justice Holmes in the Schwimmer case at page 654 underlines the principle

"...of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate."

Justice Douglas in the Girouard case joins Justice Holmes by saying that

"The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle."

Justice Douglas then quotes United States vs. Ballard, 322 US 78, 64 S Ct 882, to the effect that

"Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. West Virginia State Board of Education vs. Barnette, 319 U.S. 624, 63 S Ct 1178, 87 L. Ed. 1628, 147 A.L.R. 674."

The majority of the Supreme Court in the Macintosh case then concludes

"...that the Schwimmer, Macintosh and Bland cases do not state the correct rule of law."

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Appellant submits that Appellee's Argument, under I, relying on Macintosh, does not state the law correctly and the cases cited by Appellee in addition are similarly lacking authority. (Appellee cites on page 10, Storey vs. United States (9th Cir), 370 F 2d 255, which citation appears in his Motion to Dismiss Appeal. However, there it is designated as Stacey vs. United States.)

Appellee relies on an old, old case when he cites In re Grimley, 137 US 147 as an authority for the apparent claim of Appellee that a military man by enlisting into the Armed Forces of the United States, ipso facto, loses his constitutional rights. This argument was put to naught by Tempia vs. United States, *supra*, as thanks to the genius of the Constitution the hoary concepts were substituted by concepts more in line with our understanding of social problems. Reading the law as it ought to be read, one must conclude that wines and law decisions do not necessarily improve with age.

We do not believe that Appellee would insist that Scott vs. Sanford, 19 Howard 329 is still the law just because it was decided in 1857 to the effect that a Negro has no standing in the Court of law. The Supreme Court of the United States felt unbound by an ancient holding and so it stated in Brown vs. Board of Education, 349 US 294, 75 S Ct 753.

II

Contrary to Appellee's claim, there is an authority, and that is the due process of law which compels action even by the military.

Burns vs. Wilson, 346 US 137, 73 S Ct 1045 contradicts Appellee's claim presented as his second point on pages 14 and 15. In that case

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"The District Court dismissed the applications without hearing evidence, and without further review, after satisfying itself that the courts-martial which tried petitioners had jurisdiction over the crimes with which they were charged as well as jurisdiction to impose the sentences which petitioners received."

The Court of Appeals affirmed the District Court judgment and the Supreme Court granted certiorari because

"Petitioners' allegations are serious, and, as reflected by the divergent bases for decision in the two courts below, the case poses important problems concerning the proper administration of the power of a civil court to review the judgment of a court-martial..."

In the Burns case, the petitioners claimed they were court martialed and sentenced by that court

"as a result of proceedings which denied them basic rights guaranteed by the Constitution."

as the Appellant here claims that the two court martials and the threatened third court martial denied him basic rights guaranteed by the self-same Constitution. In the Burns case the Supreme Court held that

"The federal civil courts have jurisdiction over such applications. By statute, Congress has charged them with the exercise of that power (footnote refers to 28 USC, Para. 2241). Accordingly, our initial concern is not whether the District Court has any power at all to consider petitioners' applications; rather our concern is with the manner in which the Court should proceed to exercise its power."

Appellant claimed in his original Brief and he repeats his claim here that the District Court erred when it denied his application without a hearing on the ground that the federal courts have no jurisdiction over court martial proceedings. While we know that the Supreme Court made it

1 clear that

2 "Military law, like state law, is a jurisprudence which
3 exists separate and apart from the law which governs
in our federal judicial establishment."

4 Nevertheless, it also held in the Burns case that

5 "The military courts, like the state courts, have the same
6 responsibilities as do the federal courts to protect a person
from a violation of his constitutional rights."

7 Appellant set forth in his original pleadings filed in the District Court
8 that the threatened third court martial, if proceeded with, will violate his
9 constitutional right not to be put into double or multiple jeopardy. In
10 accordance with the holding of the Supreme Court in the Burns case and in
11 accordance with the holding of the United States Court of Military Appeals
12 in the Tempia case, supra, the District Court was bound to assume
13 jurisdiction and because of its failure to do so, the holding of that Court
14 must be reversed.

15 CONCLUSION

16 As set forth in Appellant's Opening Brief, Appellant's rights which
17 were threatened by the third court martial were of constitutional
18 dimensions, and therefore, the District Court was bound to assume
19 jurisdiction and grant the protection as prayed for in the Complaint. The
20 refusal of the District Court to do so requires reversal and the Appellant
21 prays that an Order may be entered upon the Trial Court to proceed with the
22 hearing of the case on the merits.

23 Such a hearing ought to be granted even though the third court martial
24 did in effect take place as it is claimed by Appellee on page 15 of his Brief
25 Pursuant to this third court martial he was found guilty and was sentenced
26 to one year at hard labor and to a dishonorable discharge as well as

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forfeiture of all pay and allowances. It is true as set forth by Appellee that the review of the decision of the court martial is now before the Board of Review. In fact, the Brief on behalf of Appellant was forwarded to the Board of Review in Washington, D.C. on November 20, 1967. There is, however, no decision, and since Appellant may have completed his court martial sentence before a decision is forthcoming from the Board of Review, there is no likelihood whatsoever that the case

"...may reach the Court of Military Appeals."

as claimed by Appellee.

Appellant submits that whatever the decision of the Board of Review may be, the issue raised by him in the District Court of the United States is not moot, and, in fact, the constitutional questions remain whether or not the court martial had jurisdiction to proceed against him the third time and whether or not the sentence which stamped his action based on his religious scruples "dishonorable" may stand. To determine that issue, an Order upon the United States District Court to hear the case on the merits is required.

Dated, Carmel, California,

January 10, 1968.

Respectfully submitted,

FRANCIS HEISLER
HEISLER & STEWART
PETER FRANCK

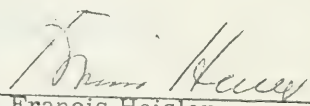
By


Attorneys for Appellant.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Reply Brief was personally served by me upon the United States Attorney, counsel for Appellee, at 450 Golden Gate Avenue, 16th Floor, San Francisco, California.



Francis Heisler
Attorney for Appellant

Dated: January 11, 1968.

NO . 21945 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED DOUGLAS DAVIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

FILED

DEC 22 1967

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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NO . 21945

IN THE UNITED STATES COURT OF APPEALS
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED DOUGLAS DAVIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California denying the appellant's motion pursuant to Title 28, United States Code, Section 2255 to vacate the criminal judgment against him. (C.T. 21).

The District Court had jurisdiction by virtue of Title 28, United States Code, Section 2255.

The jurisdiction of this court is based on Title 28, United States Code, Sections 1291, 1294 and 2255.

II

PRELIMINARY STATEMENT

Appellant was charged in a three count indictment with violations of Title 21, United States Code, Section 174, and Title 18, United States Code, Section 1407. On April 28, 1965, after a trial by jury in the United States District Court, for the then Southern District of California, Southern Division, appellant was convicted on two of the three counts in the indictment.

Following his conviction, appellant was sentenced to twenty years and fined the sum of \$20,000 on Count II of the indictment and three years on Count III of the indictment. The sentences were to commence and run concurrently resulting in a total imprisonment of twenty years and a total fine of \$20,000.

III

STATEMENT OF THE CASE

On January 24, 1966, pursuant to Title 28, United States Code, Section 2255, appellant petitioned the sentencing court to vacate and set aside the judgment of conviction against him. (C.T. 2-8).^{1/}

Conrad Walker, attorney, was appointed to represent petitioner in the hearing which petitioner attended. (C.T. 10).

On August 12, 1966, United States District Judge James M. Carter filed a memorandum to counsel in which the petition was denied. (C.T. 16-17). On February 3, 1967 Findings of Fact and Conclusions of Law were filed as was an Order denying the petitioner's motion. (C.T. 18-21).

^{1/}"C.T." refers to Clerk's Transcript. -2-

On March 6, 1967, petitioner filed a Notice of Appeal. (C.T. 25).

STATEMENT OF THE FACTS

Petitioner retained Murray Goodrich, attorney, to represent him for purposes of bail reduction, (R.T. 9, 41) ^{2/} and discussed the matter with petitioner thoroughly. (R.T. 41).

After petitioner was released on bond, he retained Goodrich but never paid him. Goodrich was relieved as retained counsel, and then appointed by the Court. (R.T. 44).

Attorney Goodrich talked to petitioner's wife in petitioner's presence and on several other occasions and both agreed she could be of no help. (R.T. 42, 43). Goodrich talked to petitioner's mother, who said she could be of no help to her son. (R.T. 42).

Petitioner admitted on cross-examination that he had discussed the case with Mr. Goodrich on several occasions and that he never asked that his mother or wife be called as witnesses. (R.T. 28-29).

Goodrich, an experienced criminal and civil trial attorney, (R.T. 47-48) felt it would have an adverse effect to call the wife as a witness. (R.T. 42).

He also felt the petitioner should not testify as a matter of trial strategy, because of his prior felony conviction, and because he couldn't satisfactorily explain his presence at the airport. Petitioner agreed he should not testify. (R.T. 39). Petitioner didn't tell Mr. Goodrich he wanted to testify and admitted his prior felony conviction. (R.T. 18, 19).

Petitioner complimented Goodrich on doing a good job. Goodrich advised petitioner before the jury returned to appeal if he lost. Then after the case was over he told him again he could appeal. He never asked Goodrich to appeal. (R.T. 58, 65).

Petitioner admits they discussed an Appeal. (R.T. 64).

IV

ERROR SPECIFIED

Appellant has specified four points on appeal:

- "1. The District Court erred in denying appellant's motion to vacate and set aside sentence where the record clearly reflects the deprivation of assistance of counsel at a crucial stage in the criminal proceedings.
- 1(a) The District Court erred in denying appellant's motion to vacate and set aside sentence where the record fails to show an intentional waiver of his right to appeal.
2. The District Court erred in denying appellant's motion to vacate and set aside sentence where the record and files clearly reflected the deprivation of a fundamental and basic constitutional right.
- 2(a) An accused in a criminal prosecution has the constitutional right to present his own witnesses to establish a defense and it is plain that this constitutional guarantee may not be waived by or through trial strategy of court appointed trial counsel without the accused's specific assent."

ARGUMENTA. APPELLANT PETITIONER WAS NOT DEPRIVED OF COUNSEL.

Judge Carter found that attorney Goodrich advised petitioner of his right to appeal and that petitioner knowingly waived that right. (C.T. 17, 18). The record sustains such a finding. Judge Carter further believes Goodrich and not the petitioner. (C.T. 19).

See Layne v. United States, 266 F.Supp. 656 (ED Tenn.S.D. 1957)

Judge Carter had known Goodrich in New York and in San Diego. (R.T. 36). Petitioner was impeached by his prior felony conviction. (R.T. 37).

Judge Carter found that the petitioner had counsel of his choice before, during, and after the trial. (C.T. 16, 18).

In this case Mr. Goodrich told appellant of his right to appeal on more than one occasion, (R.T. 57, 58) and said "appeal anything if you lose it." After the conviction attorney Goodrich said "well you can still appeal the case. (R.T. 58)" "I simply told him you can appeal the thing, and right away." (R.T. 65). Appellant admits discussing an appeal. (R.T. 64).

A bare allegation such as that (deception practiced by counsel) does not open the prison gates.

Desmond v. United States, 333 F.2d 378 (1st Cir. 1964)

The facts show petitioner was not "misled" by counsel as was found in Doyle v. United States, 366 F.2d 394 (9th Cir. 1962) relied on by

petitioner. Goodrich told petitioner "I wouldn't handle an appeal. (R.T. 64).

An additional fact indicating a waiver of his right to appeal is evidenced by the late lodging of the instant petition on January 24, 1966, several months after his conviction and sentence on April 28, 1965. (C.T. 2, 8). During the interim period retained counsel made a written motion for reduction of sentence on June 16, 1965. Such delay alone is sufficient to sustain the Court's denial of the petition.

Layne v. United States, supra;

Desmond v. United States, supra.

In Desmond at 381 it was said, "It will not even do for a prisoner to wait any longer than is reasonably necessary to prepare appropriate moving papers, however inartistic, after discovery of the deception practiced upon him by his attorney."

Under this section, there must be a showing of plain reversible error by the petitioner.

Mitchell v. United States, 254 F.2d 954 (D.C. Cir. 1958)

Dodd v. United States, 321 F.2d 240 (9th Cir. 1963)

Glouser v. United States, 296 F.2d 853 (8th Cir. 1961), cert. denied, 369 U. S. 825

Watkins v. United States, 356 F.2d 472 (9th Cir. 1966)

Judge Carter found to the contrary after a review of the trial record. (C.T. 20).

Relying on Dodd, the Court in Watkins denied relief under Section 2255 even though the attorney failed to appeal the original conviction as he

had been requested to do.

Also see Wilson v. United States, 338 F.2d 54 (9th Cir. 1964) where contrary to instructions, the attorney failed to appeal.

Failure to appeal may not be excused upon a mere showing of neglect of counsel.

Dennis v. United States, 177 F.2d 195 (4th Cir. 1949)

The same was true where counsel refused to appeal because the defendant could not pay a fee.

Mitchell v. United States, supra.

B. APPELLANT PETITIONER WAS NOT DEPRIVED OF HIS RIGHT TO HAVE WITNESSES IN HIS BEHALF.

Petitioner argues that he was deprived of the right to the testimony of his mother and wife at his trial.

Judge Carter found that petitioner discussed with counsel the possibility of calling petitioner's mother and wife and decided against it as a matter of trial strategy. (C.T. 19).

See McDonald v. United States, 282 F.2d 737 (9th Cir. 1960).

He further found there was no material evidence they could have offered on petitioner's guilt or innocence. (C.T. 19).

The record sustains such a finding.

Attorney Goodrich not only asked the petitioner if his mother and wife, or anyone else, could help, but also asked the wife and mother. (R.T. 41, 42, 52-54). The mother expressly denied knowing anything at all. (R.T.

42). Petitioner and Goodrich agreed the mother's testimony would be useless. (R.T. 43).

Petitioner thought he was going to trial on February 9, 1965, and brought his wife rather than his mother. (R.T. 21). Admittedly his wife could only testify to a conversation with attorney Goodrich. (R.T. 17, 24-25). It appears significant that neither testified at this hearing.

It has been specifically held that impeaching testimony is not sufficient to grant a petition such as this.

Layne v. United States, supra.

Appellant contends that Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949) holds that a specific assent is required before a constitutional right may be waived.

In Leser v. United States, 358 F.2d 313 (9th Cir. 1966) it was noted this expression is dicta and the Court found in effect that silence may constitute a waiver.

The relatively recent and much cited case of Dodd v. United States, supra, in an opinion written by the then United States District Judge James M. Carter, (now a Judge for the Ninth Circuit Court of Appeals) appears to hold against petitioner as to most points raised by petitioner in this appeal.

Where, as the trial court did in this hearing, a Finding of Fact is made, the finding shall not be overturned unless clearly erroneous.

Federal Rules of Criminal Procedure 52(a)

Arellanes v. United States, 353 F.2d 270, 272 (9th Cir. 1965)

In Arellanes at page 272, the Court said, "The appellant, then,

comes to this Court with the heavy burden of persuading us that the trial Judge's findings were clearly erroneous." (Emphasis supplied). Arellanes involved a 2255 Motion, also.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted the appellant's petition to vacate sentence in the District Court should be denied.

Respectfully submitted,

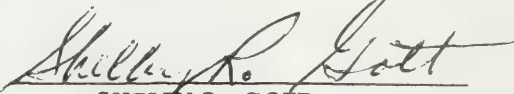
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


SHELBY R. GOTT

No. 21947 ✓

See Vol.
3450

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK N. RAWLINGS,

Appellant,

vs.

NATIONAL MOLASSES Co., a corporation; ORITA LAND
& CATTLE CORPORATION, a corporation; HEBER
CATTLE FEEDERS, a corporation; and ALLIED CATTLE
FEEDERS, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

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FILED

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FEEDERS, a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

This appeal is by Plaintiff-Appellant, Frank N. Rawlings, from a final District Court order summarily dismissing this action for infringement of United States Patent No. 2,748,001.* The dismissal was granted on Appellees' motion [R. 337], based solely on the proposition that one Feed Service Corporation (hereinafter called "Feed Service"), a non-exclusive licensee under the patent (and not subject to service of process), has a "joint interest" therein which renders it an indispensable party within the meaning of Rule 19(a), Federal Rules of Civil Procedure. There is nothing in the record showing that Feed Service owns or asserts any claim or interest other than the non-exclusive license, Exhibit B.

*While Patent No. 2,807,546 was sued upon in the original complaint, the amended and supplemental complaint was subsequently dismissed as to that patent.

I.

Statement of Pleadings and Jurisdictional Facts.

A. Pleadings.

The pleadings are: the original complaint [R. 1], which was superseded by the amended and supplemental complaint [R. 211]; and Appellees' answer to the amended and supplemental complaint [R. 276], challenging validity of the patent and denying infringement.

The motion proceedings are: Appellees' motion to dismiss [R. 329]; the Court's order granting the motion [R. 526]; Appellant's motion for new trial [R. 529]; and the District Court's order denying the motion for new trial [R. 571].

The documents evidencing the title status of the patent are: the issued patent, R. 336; the assignment, Ex. A, R. 332, see Appendix A; and the non-exclusive license, Ex. B, R. 334, see Appendix B.

B. Jurisdiction.

Jurisdiction of the District Court arises under the patent statute, Title 35 U.S.C., and under 28 U.S.C. 1338a. Venue arises under 28 U.S.C. 1400a. Appellate jurisdiction arises under 28 U.S.C. 1291.

C. The Parties.

The parties are: Plaintiff-Appellant Frank N. Rawlings, and the Defendants-Appellees, National Molasses Co., a Delaware corporation (hereinafter sometimes called "National"), licensed to do business in the State of California, and maintaining a regular and established place of business in Wilmington, Los An-

geles County, California; Orita Land & Cattle Corporation, Heber Cattle Feeders, and Allied Cattle Feeders, California corporations having regular and established places of business in Imperial County, California.

II.

Statement of the Case.

A. Facts.

The amended and supplemental complaint charges infringement by appellees of United States Patent No. 2,748,001. The patent is for a joint invention of appellant and one Frank C. Anderson (hereinafter called "Anderson"). Prior to issuance of the patent, Anderson assigned all his interest to Feed Service; and the patent issued to appellant and Feed Service, as co-owners, as shown on the face of the patent [R. 336].

Appellant gave written notice to Feed Service (a Nebraska corporation not subject to service of process), of the intended filing of this action, and invited it to join, which invitation was declined (see appellant's unrefuted affidavit [R. 569], Appendix C p. 5a). Upon said refusal to join, appellant instituted this action, naming Feed Service, then a co-owner of the patent, as an unwilling party, although it never appeared, and service of the court's process could not be obtained.

Subsequently, and prior to the filing of the amended and supplemental complaint, appellant acquired from Feed Service a full *assignment* of all the latter's right, title and interest in the patent [Ex. A, Appendix B, p. 1a], and Feed Service acquired from appellant a *non-exclusive* license to practice the invention and to *non-exclusively* sublicense others to do so. [Ex. B,

Appendix B, p. 3a]. By stipulation and court order [R. 209], appellant then dismissed the action as to Feed Service and, in his new capacity as sole owner, filed his amended and supplemental complaint.

After answer, appellees moved to dismiss under Rule 19(a), Federal Rules of Civil Procedure, the motion being based on the non-joinder of Feed Service, claimed by appellees to be an indispensable party; which motion was granted by the District Court order entered December 21, 1966 [R. 526], reading as follows:

“At the time this suit was filed, Feed Service Corporation of Nebraska owned one-half interest in the patents in suit but declined to participate in this action either as plaintiff or defendant.

“To circumvent rule 19(a), the plaintiff obtained a document entitled ‘Patent Assignment’ from Feed Service Corporation in exchange for a document entitled ‘Patent License Grant.’

“However, after the exchange of these documents, Feed Service Corporation still has all the rights it had as co-owner, including the right to grant sublicenses and retain the royalties.

“THEREFORE, it appears to me that Feed Service Corporation has a joint interest in the patent in suit and is an indispensable party within the meaning of Rule 19(a).

“Defendants’ motion to dismiss is therefore granted.”

After which order appellant moved for a new trial [R. 529] under Rule 59 of the Federal Rules of Civil Procedure, which motion was denied by the District

Court's order entered March 24, 1967 [R. 571], reading as follows:

"This court granted a Motion to Dismiss for failure to join an indispensable party within the meaning of Rule 19(a), and plaintiff now moves for a new trial pursuant to Rule 59 which defendant counters with a Motion to Strike. The motions were submitted on briefs.

"I have reviewed the briefs and still feel that the interest of Feed Service in this patent makes them an indispensable party.

"THEREFORE the motion for new trial is denied."

Thus, the dismissal leaves appellant without any adequate remedy for the infringement.

On April 17, 1967, appellant noticed this appeal.

B. Questions Involved.

1. Whether Feed Service owns or claims any interest in the subject matter of this action which renders it an indispensable party.

2. Whether Feed Service still owns the rights it owned previous to its assignment. Ex. A, at which time it was a co-owner of the patent.

3. Whether the District Court construed, or was justified in construing, the contracts Exhibits A and B contrary to their express terms and conditions.

4. Whether the record established that Feed Service owns or asserts any claim such as is expressly required

by Rules 19(a) and 19(b), Federal Rules of Civil Procedure, to render it an indispensable party.

5. Whether the record establishes that Feed Service owns or asserts any claim which, in its absence, could not be amply protected by protective provisions in a judgment between the existing parties.

6. Whether the record establishes that Feed Service owns or asserts any claim which, in its absence, would be prejudiced by a judgment between the existing parties.

7. Whether the District Court's dismissal for non-joinder of Feed Service deprives Appellant of an adequate remedy for the alleged infringement since Feed Service is not subject to service of process.

8. Whether in the absence of Feed Service a judgment between the existing parties would be adequate.

9. Whether the record establishes any reason why this action cannot proceed to judgment among the existing parties pursuant to Rule 19(b), Federal Rules of Civil Procedure.

10. Whether a non-exclusive patent licensee is a proper party to an action by the patent owner for infringement of the patent.

Appellant submits that questions 1-6, inclusive, and 9 and 10 should be answered in the negative, and that questions 7 and 8 should be answered in the affirmative.

III.

Specification of Errors.

Appellant contends that it was clearly erroneous for the District Court:

A. To conclude and hold that Feed Service is an indispensable party and to summarily dismiss the action on that ground.

B. To conclude and hold that, after the documents, Exhibits A and B were executed, Feed Service still had all the rights in the patent which it had before those documents were executed.

C. To summarily dismiss this action.

D. In failing to conclude and hold that Feed Service does not own or assert any claim which would bar proceeding to judgment among the existing parties to this action.

E. In failing to conclude and hold that Feed Service does not own or assert any claim which would prevent complete relief from being accorded in its absence by a judgment between the existing parties.

F. To fail to conclude and hold that the non-exclusive license, Exhibit B, held by Feed Service, does not constitute a claim which renders Feed Service an indispensable party.

G. To fail to conclude that there is any issue properly before the Court which questions the authenticity of the contracts Exhibit A and B.

H. To fail to construe Exhibits A and B in accordance with their express intents, terms and conditions.

IV.

Argument.

- A. By Its Terms, Rule 19(a), Federal Rules of Civil Procedure, Is Not Applicable to an Absent Party Which Is Not Subject to Service of Process, or Which Does Not Assert a Claim of the Nature Required by Subdivisions (1) and (2) of the Rule.

The ground upon which the District Court dismissed this action, as well as the ground on which appellees' Motion to Dismiss is based, is stated in the order to be:

“that Feed Service Corporation has a joint interest in the patent in suit and is an indispensable party within the meaning of Rule 19(a).” [R. 526].

Rule 19(a), as well as Rule 19(b), Federal Rules of Civil Procedure, were both revised and amended in 1966 and, as amended, read as follows:

“(a) Persons to be Joined if Feasible. A *person who is subject to service of process* and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action *if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.* If he has not been so joined, the court

shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.” (emphasis added).

“(b) Determination by Court Whenever Joinder not Feasible. *If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience that action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person’s absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person’s absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.*” (Emphasis added.)

The amended rules were fully analyzed and discussed in *Barron and Holtzoff*, “*Federal Practice and Procedure*”, Rules Edition, Section 521, as quoted in full in Appendix D page 8a to this brief.

Rule 19(a), Federal Rules of Civil Procedure, expressly provides that it applies only where it is *feasible* to join an absent person; and, even then, it applies only

where the absent person asserts a claim of the character defined by subdivisions 1 and 2 of the rule, neither of which is the case here.

It should be pointed out that, while Rule 19(b) was not invoked, by reference, it also incorporates the requirements of subdivisions (1) and (2) of Rule 19(a); Rule 19b appearing to apply only where the absent person asserts a claim of the character required by said subdivisions.

Apart from the fact that Feed Service is not subject to service of process, it is Appellant's fundamental contention that a non-exclusive patent license, such as held by Feed Service, does not include or convey any ownership or other interest in the patent which could render it an indispensable or even a permissible party.

Waterman v. Mackenzie, 138 U.S. 252, 256, 11 S. Ct. 334, 34 L. Ed. 923; and

Western Electric Co. v. Pacent Reproducer Corp., 42 F. 2d 116 (C.A. 2, 1930), cited under Paragraph IV, C, of this brief.

However, even if it could properly be held that a non-exclusive license constitutes a claim or interest of the character required by the rules, it is submitted that the Court below properly should have weighed the alleged claim in the light of the provisions of Rule 19-(b)*.

As pointed out in *Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Section 512*, quoted in full in Appendix D, page 8a to this brief,

*The moving party, however, did not place before the court any showing as to the factors expressly required by the rule to be considered by the court in applying the discretionary powers provided by the rule.

the 1966 amendments to Rule 19, Federal Rules of Civil Procedure, were not so much for the purpose of changing the meaning and purport of the old rule, as it previously had been applied by the courts, but, rather, the amendments were for the purpose of clarifying the rule and making its application more equitable and less rigid, harsh and inflexible. That is, the amended rule enables the court to avoid the harsh remedy of summarily dismissing an action, as the Court did in this case, by directing that the case proceed to judgment between the parties already before the court, in which case appropriate protective clauses could be included in the judgment to avoid any prejudice with respect to any claim or interest asserted by the absent party.

Prior to the 1966 amendments to the rule, it had been interpreted by this court in the leading case of *State of Washington v. United States*, C.A. 9, 1936, 87 F. 2d 421, 427, from which this court quoted approvingly in *Stumpf v. Fidelity Gas Co.*, C.A. 9, 1961, 294 F. 2d 886, as follows:

“There are many adjudicated cases in which expressions are made with respect to the tests used to determine whether an absent party is a necessary party or an indispensable party. From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree made, in

the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?"

A recent decision interpreting the rule *as amended* is as follows:

"Since the amendments to Rule 19 of the Federal Rules of Civil Procedure, the former designations of proper, necessary, and indispensable parties have given way to the concept of parties regarded as indispensable by the Court for just adjudication. Whenever joinder of a party is not feasible, the Court must determine whether such party's presence is indispensable for just adjudication. Rule 19(b) of the Federal Rules of Civil Procedure suggests the factors to be considered by the Court in this determination."

Norvell v. McGraw-Edison Co., 154 USPQ 355, 356 (1967, E.D. Wis.).

It is believed that the District Court's decision summarily dismissing the present action for the non-joinder of Feed Service, which is not subject to service of the court's process, aptly points up the advisability of the 1966 amendments to Rule 19, because the summary dismissal here, unless reversed, deprives Appellant of an adequate remedy for the alleged infringement by Appellees; which result could have been avoided by the Court applying the discretionary powers provided by the amended rule.

B. Even a Patent Owner, Which Is Beyond the Reach of Process, Will Be Bound by a Judgment Rendered in Its Absence When It Has Been Invited but Refused to Join Voluntarily.

As pointed out under Paragraph II A of this brief, Appellant gave Feed Service notice of the imminent filing of this action and invited it to appear voluntarily, which invitation was declined, after which refusal this action was commenced. Thus, whether or not Feed Service claims any actionable interest in the patent, it would nevertheless be bound by the judgment.

“The owner beyond the reach of process may be made coplaintiff by the licensee, but not until after he has been requested to become such voluntarily. If he declines to take any part in the case, though he knows of its imminent pendency and of his obligation to join, he will be bound by the decree which follows.”

Independent Wireless Telegraph Company v. Radio Corporation of America, 1926, 269 U.S. 459, 70 L. Ed. 357.

C. A Non-Exclusive Licensee Is Not a Proper Party to a Patent Infringement Action.

The patent statute (35 U.S.C. 154) defines a patent grant as consisting solely of the “*right to exclude others* from making, using or selling the invention.” The patent document also defines the grant in the same language.

Prior to 35 U.S.C. 154, the statute defined the patent grant as consisting of the “exclusive right to make, use and sell the invention”, although the Courts had interpreted that provision as meaning only “the right

to exclude others". See the revision note accompanying 35 U.S.C. 154, reading as follows:

"The wording of the granting clause is changed to 'the right to *exclude others* from making, using, or selling', following language used by the Supreme Court, to render the meaning clearer."

Prior to 35 U.S.C. 154, the Supreme Court had held, in *Special Equipment Company v. Coc*, 324 U.S. 370, 89 L. Ed. 1006, 1012, as follows:

"The patent grant is not of a right to the patentee to use the invention, for that he already possesses. It is a grant of the right to exclude others from using it."

Therefore, in order to have any right to *exclude others* from the patent monopoly, a licensee must hold a license which is at least *exclusive* to all or part of the United States. A non-exclusive licensee does not possess any such right.

35 U.S.C. 100 defines a patentee as:

"a person or persons to whom the patent was issued and its *successors in title* to the patent."

35 U.S.C. 261 provides that an assignment or conveyance of any title to a patent must be in writing and must convey *an exclusive right* to the patent in all or part of the United States.

35 U.S.C. 281 (defining remedies for patent infringement) only provides that a "patentee" (as defined in 35 U.S.C. 100) shall have remedy by civil action for infringement of its patent.

Justice Biggs of the Third Circuit in *Innis, Speiden & Co. v. Food Machinery Corporation* (1942), 2 F.R.D.

261, defined a license (non-exclusive) as being nothing more than the grant of authority to practice the invention, and likens such a license to the grant of a simple easement across "Blackacre", saying:

"The possessor of the easement has the privilege to cross the land but has no right to prevent anyone else from doing so. The owner of the land is not compelled to take any step to protect his grantee's right to cross Blackacre."

That opinion further stating that such a licensee

"has no such interest as to make him either a necessary or proper party to a bill filed to restrain the infringement of a patent right."

The landmark decision of the Supreme Court in point is *Waterman v. Mackenzie*, 138 U.S. 252, 255, 34 L. Ed. 923, from which the following is a quotation:

"Every patent issued under the laws of the United States for an invention or discovery contains "a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States and the Territories thereof.' Rev. Stat. §4884.* The monopoly thus granted is *one entire thing*, and cannot be divided into parts, except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign, grant, and convey, either (1st) the whole patent, comprising the *exclusive* right to make, use and vend the invention throughout the United States; or (2d) an undivided part or share

*Now 35 U.S.C. 154.

of that *exclusive* right; or (3rd) the *exclusive* right under the patent within and throughout a specified part of the United States. Rev. Stat. § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. *Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent.* (Emphasis added.)

See also *Western Electric Co. v. Pacent Reproducer Corp.*, 42 F. 2d 116 (C.A. 2, 1930), as follows:

“In its simplest form, a license means only leave to do a thing which the licensor would otherwise have a right to prevent. Such a license grants to the licensee merely a privilege that protects him from a claim of infringement by the owner of the patent monopoly . . . *He has no property interest in the monopoly of the patent, nor any contract with the patent owner that others shall not practice the invention.* Hence the patent owner may freely license others, or may tolerate infringers, and in either case no right of the patent licensee is violated. Practice of the invention by others may indeed cause him pecuniary loss, but it does him no legal injury.”

* * *

“If the licensee is granted not only leave to make, use and vend the invention, *but also the right to exclude from the licensed field every one else,*

including the patent owner himself, the grant may amount to an assignment of an interest in the patent, entitling the licensee to sue an infringer in his own name; if it is less inclusive, it remains a license. Waterman v. Mackenzie, 138 U.S. 252, 265, 11 S. Ct. 334, 34 L. Ed. 923."

D. The Undisputed Record Shows Appellant to Be the Sole Owner of the Patent in Suit.

The patent document [R. 336] shows that the patent originally issued to appellant and Feed Service as co-owners. By the Assignment, Exhibit A, appellant acquired all the right, title and interest of Feed Service in the patent. There is no issue as to the authenticity of those documents. During argument, Appellees' counsel advanced the bare conclusionary argument that Exhibits A and B were "shams", but being entirely unsupported, that characterization is nothing more than an advocate's conclusion, and of course is not a competent challenge. In fact, the advocate's conclusion is not even supported by an affidavit, and appellees have also failed to refute Appellant's affidavit (Appendix C, p. 5a), stating the facts of the transaction out of which Exhibits A and B arose. In any event, if Appellees had intended seriously to urge or to raise any such issue, they had the burden under Rule 8, Federal Rules of Court Procedure of alleging affirmatively upon what it was based so that the issue could be fully explored by discovery, evidence and examination of witnesses at a trial. Factual questions cannot be summarily resolved on the basis of disputed affidavits.

As held by this Court in *Hoffman v. Babbitt Bros. Trading Co.*, C.A. 9, 1953, 203 F. 2d 636, 637:

“It will be remembered that the court had held that a cause for relief had been stated. Now we quote from our opinion in *Lane Bryant, Inc. v. Maternity Lane Ltd. of Cal.*, 9 Cir., 1949, 173 F. 2d 559, 564: ‘We come to the question: Can the judgment be affirmed as one in a summary proceeding? We have already held that a cause of action has been stated by the complaint. The affidavits upon their broadest application do no more than to present to the trier of fact evidence upon material issues. They do not absolve the issues as matters of law. Therefore, the judgment cannot validly be based upon the summary trial by affidavits. The plaintiff-appellant is entitled to have its complaint responded to by answer and both parties are entitled to have the issues tried through the introduction of exhibits and witnesses produced for direct and cross-examination.’ This is a statement of the general law and we know of no deviation from it.”

In its opinion in the latter case, this Court approvingly quoted from *Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Vol. 3, Section 1231*, the following:

“The summary judgment procedure is not a substitute for the trial of disputed issues of fact. On a motion for summary judgment the court cannot try issues of fact. It can only determine whether there are issues to be tried. The procedure is well adapted to expose sham claims and defenses

but cannot be used to deprive a litigant of a proper trial of genuine issues of fact. Summary judgment is not proper where the facts are uncertain. It cannot be used to determine questions of fact without an adequate and proper hearing. Rule 56 is not merely directory but affects the substantial rights of the litigants and since it provides a somewhat drastic remedy it must be used with a due regard for its purposes, and a cautious observance of its requirements in order that no person will be deprived of a trial of disputed factual issues.

* * *

This constitutional principle is also borne out by the Supreme Court's decision in *Societe Internationale v. Rogers*, 357 U.S. 197, 2 L. Ed. 2d 1255, in which the Supreme Court held that Federal Rules of Civil Procedure which permit of summary disposition of fact issues must be interpreted in the light of the Due Process Clause of the Constitution, and that fact issues cannot be resolved without allowing the parties full rights to cross examination at a trial.

While it is not known whether the District Court, in reaching its decision, gave any weight to the unsupported suggestions of "sham", an examination of two statements contained in the Court's order might possibly suggest that the Court may have been misled by the remark. That is, the order of dismissal [R. 526] contains the statement that the agreements Exhibits A and B were entered into "to circumvent Rule 19(a)". Of course, that rule became moot after appellant be-

came the sole owner of the patent, but there is no support for the suggestion that the agreements were entered into for any ulterior purpose.

The Court order also contains the statement that, after those agreements were entered into, "Feed Service still had all the rights it had as co-owner". This statement is fully refuted by the written agreements themselves, which show that, before the assignment Exhibit A, Feed Service was a co-owner of the patent and, as such, had a right to sue to exclude others from practicing the patented invention, while, after the agreement, it did not have any such right.

**E. The District Court's Order of Dismissal Is
Final and Appealable.**

The Court's order did not direct the submission of any findings, conclusions or judgment, and none were made. Appellant could not have overcome the dismissal by amending the complaint even if the order had permitted such an amendment, which it did not, because jurisdiction could not be obtained over Feed Service. Thus, after the dismissal order, appellant did the only thing he could. He filed motion for new trial, which was denied, and he then noticed an appeal to this Court.

Kelly v. Delaware River Joint Commission, 187
F. 2d 93, C.A. 3, 1951.

Conclusion.

Wherefore, Appellant respectfully submits that the District Court's order of dismissal should be reversed with direction to proceed to trial and judgment between the parties now before the Court. In that event, Appellees would have full opportunity to plead and prove, if they have any such evidence, that Feed Service is an "indispensable" party as claimed by appellees.

Respectfully submitted,

MASON & GRAHAM,

COLLINS MASON,

WILLIAM R. GRAHAM,

By COLLINS MASON,

*Attorneys for Plaintiff and
Appellant.*

RAY, QUINNEY & NEBEKER,

C. PRESTON ALLEN,

Of Counsel.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

COLLINS MASON

APPENDIX A.

Patent Assignment.

WHEREAS, PHILIP C. ANDERSON, of Crete, Nebraska, and FRANK N. RAWLINGS, of Caldwell, Idaho, are joint inventors and patentees of the following United States Letters Patent:

2,748,001, dated May 29, 1956; and

2,807,546, dated September 24, 1957; and

WHEREAS, the undersigned FEED SERVICE CORPORATION, a Nebraska corporation, having its principal place of business in Crete, Nebraska, has heretofore acquired and now owns an undivided one-half of the entire right, title and interest in and to said letters patents and each thereof; and

WHEREAS, said FRANK N. RAWLINGS now owns the remainder of the entire right, title and interest in and to said patents and each thereof, and now desires to acquire all said right, title and interest of said FEED SERVICE CORPORATION in and to said patents and each thereof;

NOW THEREFORE, for and in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration, receipt and adequacy of which are hereby acknowledged, the undersigned FEED SERVICE CORPORATION does hereby sell, assign, transfer and set over unto said FRANK N. RAWLINGS, his heirs, assigns, successors and legal representatives, all its said undivided one-half of the entire right, title and interest in and to said patents and each thereof, as well as the right to sue and recover for all past infringement thereof.

IN WITNESS WHEREOF, this assignment has been executed at Crete, Nebraska, on this 27th day of December, 1965.

FEED SERVICE CORPORATION

By Philip C. Anderson

President

By Norma Gene Anderson

Secretary

State of Nebraska, County of Saline—ss.

On this 25th day of March, 1966, before me, personally appeared Philip C. Anderson, known to me to be the President, and Norma Gene Anderson known to me to be the Secretary, of FEED SERVICE CORPORATION, a Nebraska corporation, who executed the within instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.

/s/

Notary Public in and for
said County and State

APPENDIX B.

Patent License Grant.

WHEREAS, the undersigned FRANK N. RAWLINGS, of Caldwell, Idaho, now owns the entire right, title and interest in and to the following United States Letters Patents and each thereof:

No. 2,748,001, dated May 29, 1956; and

No. 2,807,546, dated September 24, 1957; and

WHEREAS, FEED SERVICE CORPORATION, a Nebraska corporation, having its principal place of business in Crete, Nebraska, desires to acquire the hereinafter described nonexclusive license rights under said patents and each thereof;

NOW, THEREFORE, for and in consideration of the sum of Ten Dollars (\$10.00), and other good and valuable consideration, receipt and adequacy of which are hereby acknowledged, the undersigned FRANK N. RAWLINGS does hereby grant and convey to said FEED SERVICE CORPORATION, an unlimited, royalty-free, non-exclusive, and non-cancellable right and license to make, use and sell the products and use the methods of said patents and each of them, and to sublicense others so to do. The right and license herein granted shall be effective until said letters patents and each of them shall expire.

IN WITNESS WHEREOF, the undersigned has executed this document at Caldwell, Idaho, this 27th day of December, 1965.

/s/ Frank N. Rawlings

FRANK N. RAWLINGS

State of Idaho, County of Canyon—ss.

On this 18th day of March, 1966, before me, personally appeared FRANK N. RAWLINGS, to me known to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

WITNESS my hand and official seal.

/s/ Hazel F. Hansen

Notary Public in and for said
County and State

Commission expires 6-6-69

APPENDIX C.

Affidavit of Frank N. Rawlings.

United States District Court, Central District of California.

Frank N. Rawlings, Plaintiff, vs. National Molasses Co., a corporation; Orita Land & Cattle Corporation, a corporation; Heber Cattle Feeders, a corporation; and Allied Cattle Feeders, a corporation, Defendants. Civil Action No. 65-592-MC.

State of Idaho, County of Canyon—ss.

FRANK N. RAWLINGS, being first duly sworn, deposes and says:

The facts relating to the transaction by which I obtained an assignment of all the right, title and interest of Feed Service Corporation (Exhibit A), and granted Feed Service Corporation a non-exclusive license (Exhibit B), are as follows:

Prior to said agreements, Feed Service Corporation owned an undivided half of the title to United States Patents Nos. 2,748,001 and 2,807,546, and I owned the other half. When the matter of commencing the above identified infringement action arose, I wrote to Feed Service Corporation on December 7, 1964, inquiring as to whether it would join in the above-identified infringement action as a co-owner of the patents. I received a letter from Feed Service Corporation under date of December 22, 1964, from which the following is quoted:

“Your letter of December 7th has come to the top of the pile that I faced upon my return.

“We are not in a position to join with you in a suit against National Molasses. The reasons are that (1) we would not want to alienate their parent company and (2) that we do not have the capital nor the managerial time required.”

To understand why Feed Service Corporation was unwilling to risk alienating the parent company of defendant National Molasses Company, it should be pointed out that Feed Service Corporation is a producer of ruminant cattle feed supplements, an ingredient of which is molasses, and the parent company of National Molasses Company is an important producer and supplier of molasses, so that, as stated in its said letter, Feed Service Corporation desired to avoid the risk of alienating an important source of molasses. Also, as stated in its letter, Feed Service Corporation claimed that it had neither the financial capability nor the time which would be necessary to join in the prosecution of a patent infringement action.

Therefore, as a result of the subsequent negotiations, which were participated in by the attorneys for the respective parties, it was agreed as follows: that Feed Service Corporation would relinquish and assign to me its half interest in the title to the patents, and that I would pursue the infringement action entirely on my own, and grant Feed Service Corporation a non-exclusive license.

Said assignment document (Exhibit A) and license document (Exhibit B) memorialize bona fide transactions supported by mutual considerations—that is, Feed Service Corporation surrendered all its rights to enforce the patent monopolies but avoided the possibility

of alienating an important source of molasses, avoided expenses and liabilities arising out of prosecuting infringement actions, and also received a non-exclusive license to use the inventions and to grant sublicenses to others, while I received Feed Service Corporation's one-half of the title to the patents.

There is no other agreement relating to the transaction or subject matter, and Feed Service Corporation has no right and makes no claim to any right to recover damages in this or any other action for infringement of the patents or to in any way control or participate in any action to enforce the patent.

FRANK N. RAWLINGS

Frank N. Rawlings

Subscribed and sworn to before me this 17th day of January, 1967.

Hazel F. Hansen

Notary Public in and for said

County and State

Comm. Expires 6-6-69

(Seal)

APPENDIX D.

1966 Pocket Part of Barron and Holtzoff's "Federal Practice and Procedure", Rules Edition, Section 512, Page 25 of the Pocket Part.

"Rule 19 was completely rewritten in 1966. The former text of the rule was defective in many respects, as is pointed out in the text of the main volume and elsewhere. It purported to speak in rigid legal categories, when what is in fact involved is a discretionary balancing of conflicting interests. The new emphasis of the amended rule is evident even from the title, which speaks of 'Joinder of Persons Needed for Just Adjudication', where the old rule spoke of 'Necessary Joinder of Parties.' The new rule will produce a change of method, more than of result. Probably most cases will be decided the same way under the new rule as under the old, but the new rule requires the court to face squarely the pragmatic considerations which properly should be controlling.

"New Rule 19(a) defines a person as needed for just adjudication if '(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.' The class of persons thus defined is roughly equivalent to those who would in the past have been classified as either 'indispensable' or 'necessary',

but the old labels are not used, and old decisions applying the labels are not controlling.

"If the absent person falls into the class thus defined, and he is subject to the process of the court and his joinder will not deprive the court of jurisdiction over the subject matter of the action, he must be made a party.

"If the absent person needed for a just adjudication cannot be made a party, because of difficulties of service of process or subject matter jurisdiction, or if he is made a party and then dismissed because he validly objects to venue, the court must consider whether the action should continue without him. Rule 19(b) directs the court to determine whether in equity and good conscience the action should proceed among the existing parties, or whether it should be dismissed. If the court concludes that it should be dismissed, the absent person has been regarded as 'indispensable,' but this is a conclusory label, to be applied after determining to dismiss the action, and does not bring back into the rule the body of case law categorizing particular parties as 'indispensable'. In determining whether to proceed or to dismiss the suit, Rule 19(b) directs the attention of the court to four factors which must be considered, although they are not the only relevant factors which may be considered.

"The first factor to be considered is 'to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties.' Second, the court must consider 'the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided.' Thus the court may use protective

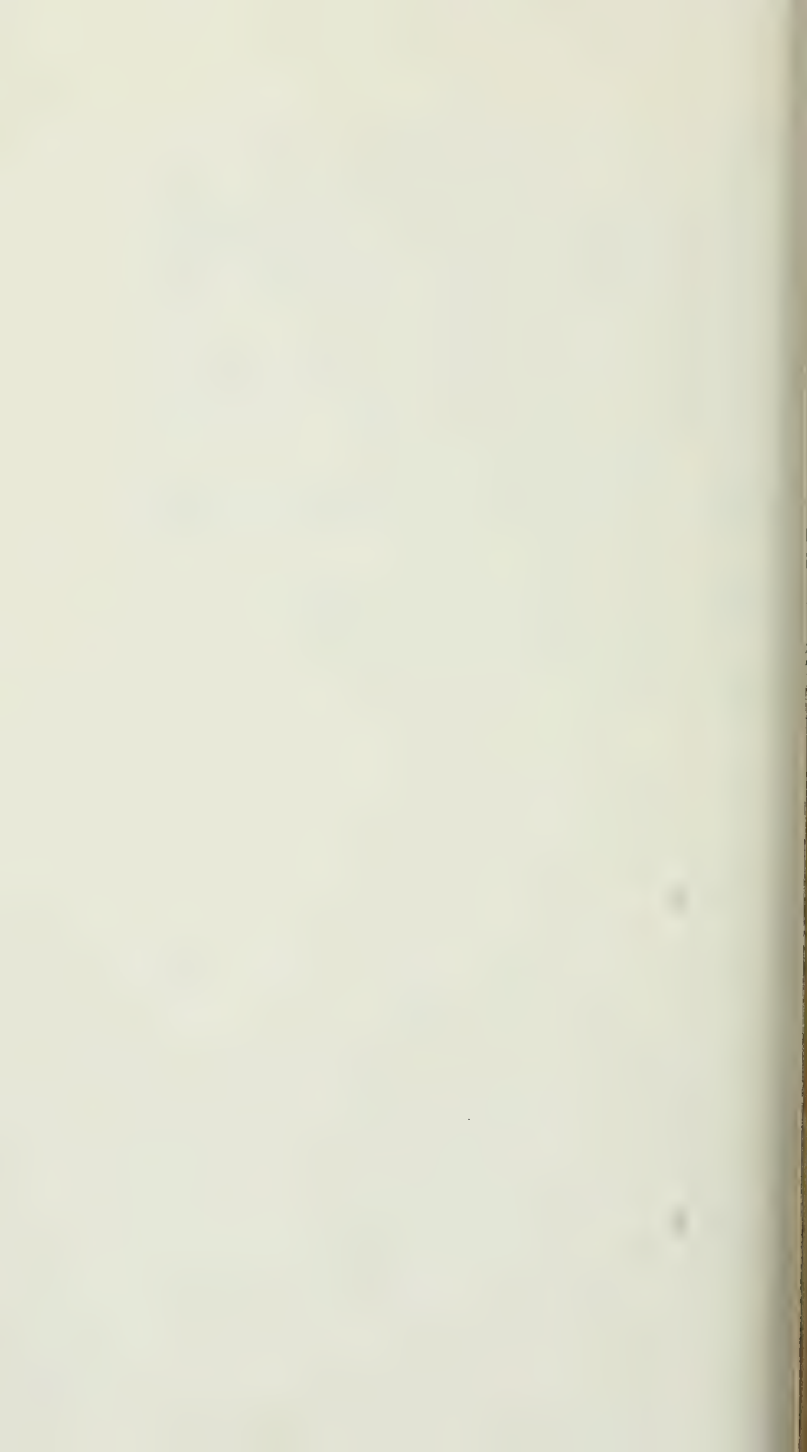
provisions, or give alternative forms of relief. The existing parties may be able to take steps to lessen or avoid prejudice, or the absentee may be able to avert prejudice to himself by appearing voluntarily. Third, the court is directed to consider 'whether a judgment rendered in the person's absence will be adequate.' Fourth, the court must consider 'whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder' of the absentee. After consideration of all of these factors, and any others which may be relevant in the particular case, the decision to proceed or dismiss must be made."

APPENDIX E.

List of Exhibits.

The only exhibits in the case are those which were filed as exhibits to the various motion papers, which appear in the record as follows:

- R. 330 Defendants' Affidavit of Joint Interest accompanying Defendants' Motion to Dismiss.
- R. 332 Patent Assignment, Exhibit A, to Defendants' Motion to Dismiss.
- R. 334 Patent License Grant, Exhibit B to Defendants' Motion to Dismiss.
- R. 336 U. S. Patent 2,748,001 attached to Defendants' Motion to Dismiss as Exhibit C.
- R. 569 Plaintiff's Affidavit, Appendix C, page 5-a.



No. 21947

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

FRANK N. RAWLINGS,

Appellant,

vs.

NATIONAL MOLASSES Co., a corporation; ORITA LAND
& CATTLE CORPORATION, a corporation; HEBER CAT-
TLE FEEDERS, a corporation, and ALLIED CATTLE
FEEDERS, a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

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COLLINS MASON,
WILLIAM R. GRAHAM,
811 West Seventh Street,
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JAN 19 1968

WM. B. LUCK, CLERK

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No. 21947

IN THE

United States Court of Appeals
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FRANK N. RAWLINGS,

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vs.

NATIONAL MOLASSES CO., a corporation; ORITA LAND
& CATTLE CORPORATION, a corporation; HEBER CAT-
TLE FEEDERS, a corporation, and ALLIED CATTLE
FEEDERS, a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

Appellees' Brief does not answer or controvert the controlling law reviewed in Appellant's Opening Brief, to the effect that a patent license which is anything less than an exclusive license does not convey any ownership interest in the licensed patent and does not render the license an indispensable party to an infringement action. Instead appellees' brief argues (a) that the order unconditionally dismissing the action is not final and appealable, and (b) without citing supporting authorities, that Feed Service Corporation, the alleged indispensable party, which is not subject to the court's jurisdiction, is a "joint owner" of the patent in suit instead of being only a non-exclusive licensee thereunder as shown by Exhibit B [R. 334]. Appellees' argu-

ment also ignores the fact that appellant is the sole owner of the patent, as shown by the assignment Exhibit A [R. 332] and, under the law, is the only one entitled to sue for infringement.

Of the legion of authorities unanimously supporting appellant's opening brief, the following are representative:

Waterman v. Mackenzie, 138 U.S. 252, 34 L. Ed. 923;

Western Electric Co. v. Patent Reproducer Corp., 42 F. 2d 116;

Special Equipment Company v. Coe, 324 U.S. 370, 89 L. Ed. 1006; and

Innis, Speiden & Co. v. Food Machinery Corporation (1942), 2 F.R.D. 262.

The fact that a non-exclusive license might authorize the licensee to grant non-exclusive sublicenses and retain any royalties derived herefrom, does not render the licensee a co-owner of the patent for the fundamental reason that a non-exclusive licensee is without any right to exclude others from practicing the invention, which is the sole right granted by a patent.

35 U.S.C. 154; and

Special Equipment Company v. Coe, supra.

The non-exclusive license agreement Exhibit B, is only a contract which precludes appellant, the patent owner, from suing Feed Service Corporation and its sublicensees to exclude them from practicing the invention. It is therefore merely in the category of a covenant not to sue.

Western Electric Co. v. Patent Reproducer Corp., supra.

I.

Appellees Have Not Cited Any Authority for Their Conclusion That a Non-Exclusive License Renders the Licensee a Co-Owner of the Patent.

The authorities cited by appellees in their brief involved actions in which the absent party was an *exclusive* licensee, or a co-owner of the patent and they are clearly distinguishable from cases involving non-exclusive licensees.

II.

Feed Service Corporation Is Not a Co-Owner of the Patent in Suit and Is Therefore Neither an Indispensable nor a Proper Party to This Infringement Action.

Appellees conclusory argument appears to be based on the untenable proposition that Feed Service Corporation still has the co-owner status it had at the time this action was commenced, despite the record fact that, by Exhibits A and B, the status of the respective parties was changed to one in which appellant became the sole owner and Feed Service Corporation became a non-exclusive licensee.

Gibbs v. Emerson Electric Mfg. Co. (D.C. Mo. 1940), 31 F. Supp. 983.

Appellant is, of course, cognizant of appellees' advocate's conclusory statement that Exhibits A and B are "shams", but, as pointed out in appellant's opening brief, that statement is entirely unsupported and was not made a formal issue or even supported by an affidavit. (See discussion of the law under heading D, p. 17 of Appellant's Opening Brief). Such questions of fact cannot be *summarily* determined. In their brief, appellees endeavor to lend weight to the conclusion by

arguing that excerpts from the deposition testimony of a Mr. Anderson) who is not a party to this action and who was deposed by appellees as their own witness), show some alleged discrepancies between the negotiations for those contracts and the final contracts. That attempt must fail, however, not only because the record does not disclose any significant discrepancy, but also because of the well-known law that the final written and executed contracts define what the parties agreed to. The facts out of which the agreements Exhibits A and B arose are set forth in appellant's *unrefuted* affidavit [R. 569].*

At page 10 of their brief, appellees cite 35 U.S.C. 262, and *Pennsalt Chemical Corp. v. Dravo*, 240 F. Supp. 837 (E.D. Pa. 1965), as purported authorities for their argument that a non-exclusive patent license renders the licensee a co-owner of the patent. However, it will be found that neither of those authorities supports appellees' argument.

The *Pennsalt* case involved a question of whether a German patent owner by assignment was an indispensable party to a declaratory judgment action. The action was between the plaintiff-infringer and the defendant-exclusive-licensee. The Court denied the motion, holding that, while the German patent owner had a justiciable interest, it could, if it saw fit, protect that interest by intervening in the action, and holding that the principal dispute involved in the action was only between the plaintiff and the defendant who were already before

*The only respect in which the Anderson deposition appears to have any relevancy to this action is Anderson's attorney's statement on the deposition record that "Feed Service Corporation has no interest in the outcome and does not want to be put to any unnecessary expense" (Appendix A, page 3b, of Appellees' Brief).

the Court; citing *Hook v. Hook & Ackerman* (C.A. 9), 187 F. 2d 52, from which the following is quoted:

“Ordinarily, a mere licensee of a patent has no right to sue an infringer, and the patent owner is under no duty to do so. An exclusive licensee obviously is in a different situation. One charged with infringement or one charging infringement would ordinarily have the right to bring the owner into the action to prevent another suit on the same alleged wrong. But these principles have no application where, as here, the defendant-cross-complainant stands as the owner under the assignment.”

35 U.S.C. 262 merely codifies the long-existing case law that a joint owner of a patent has the right to grant sublicenses without accounting to his co-owner. The code section does not purport to define who are “co-owners”.

Neither authority changes the well-settled law that, unless a patent license is exclusive to all or part of the country, the licensee is not a co-owner of the patent and has no right to exclude infringers.

Waterman v. Mackenzie, supra.

As said in *Dairy Queen v. Commissioner*, 250 F. 2d 503, 506 (C.A. 10, 1957), “the traditional test of ownership is the power to exclude others.”

As more particularly stated by the Supreme Court in *United States v. General Electric Co.*, 272 U.S. 476, 71 L. Ed. 362:

“The owner of a patent may assign it to another and convey (1) the *exclusive* right to make, use and vend the invention throughout the United States or (2) an undivided part or share of that

exclusive right or (3) the *exclusive* right under the patent within and through a specific part of the United States. *But any assignment or transfer short of one of these is a license giving the licensee no title in the patent . . .*"

III.

The Dismissal Order Is Final and Appealable.

Among appellees' inaccurate statements of the record, is the statement contained in their brief that "while the District Court dismissed the complaint, it did not dismiss the action."

To determine the inaccuracy of that statement, one only has to read appellees' motion to dismiss [R. 329], which expressly moved "*to dismiss the action*", the District Court's order granting the motion [R. 526] stating "defendants' motion to dismiss is therefore granted."

By its order summarily dismissing this action without limitation, Rule 41b, F.R.C.P., the Court in effect made a final determination denying appellant his right to relief for appellees' admitted infringement*, from which order appellant moved for and was denied a new trial. While ordinarily in due course, the Court would have entered a formal judgment confirming the order, that would have been largely only ceremonial. Appellant could not have amended (even if it had obtained a right

*See appellees' answers to appellant's interrogatories numbers 7, 8 and 9, and to appellant's request for admission number 32 (added to the record by Stipulation and Order dated December 15, 1967).

to amend) to overcome the ground of the dismissal, because Feed Service Corporation is beyond the jurisdictional reach of the Court. Thus, at the time of the order, this case had progressed to a stage of practical finality. Upon such a dismissal, plaintiff-appellant is entitled to every reasonable inference supporting his claim (*Shafer v. Mountain States Tel. & Teleg. Co.*, 335 F. 2d 932, 934 (C.A. 9, 1964)).

To avoid time-consuming and unnecessarily costly procedures, the Supreme Court has held as follows:

“As this Court has often pointed out, a decision ‘final’ within the meaning of §1291 does not necessarily mean the last order possible to be made in a case. . . . This Court has held that the requirement of finality is to be given a ‘practical rather than a technical construction.’ ”

Gillespie v. United States Steel Corp., 379 U.S. 148, 13 L. Ed. 2d 199.

For instance, in *Staggers v. Otto Gerdau Company*, 359 F. 2d 292, Second Circuit, the District Court has denied the plaintiffs’ motion to amend. The plaintiffs then appealed from that order, and the appellate Court, treating the order as a final ruling, reversed.

In *Kelly v. Delaware River Joint Commission*, 187 F. 2 93, Third Circuit, cert. den., 342 U.S. 839, 96 L. Ed. 614 (cited in appellant’s opening brief), the Court even held that an order granting a motion to dismiss the *complaint* was a final and appealable order.

In *M. Martinez v. Flores*, 299 F. 2d 888, Ninth Circuit, 1961, this Court said:

“Twice the District Court has dismissed the complaint, but never the action. There is a difference.”

IV.

In Any Event, Feed Service Corporation Would Be Bound by the Judgment Under the Principles of the Law of Res Adjudicata.

Appellees argue that *Independent Wireless Telegraph Company v. Radio Corporation of America* (1926), 269 U.S. 459, 70 L. Ed. 57, quoted from at page 13 of Appellant's Opening Brief, did not involve analogous facts. It is true that said case involves specifically different facts, but the ruling of the Court quoted in Appellant's Opening Brief was based on the principles of the law of *res adjudicata*, and in that respect the facts were analogous to the facts of this case.

Conclusion.

Wherefore, appellant respectfully submits that the non-exclusive license agreement, Exhibit B, held by Feed Service Corporation, is merely an agreement by appellant, the patent owner, that he will not sue Feed Service Corporation or its non-exclusive sublicensees, if any, to exclude them from using the invention. That is not an ownership interest in the patent. Having no right to enjoin appellees or anybody else from infringing, or to share in any recovery in this action, the non-joiner of Feed Corporation does not “leave the defendant open

to multiple litigation” as concluded by appellees at page 11 of their brief.

It is therefore respectfully submitted that the order of the District Court dismissing this action on the ground that Feed Service Corporation is a co-owner of the patent and an indispensable party, should be reversed.

Respectfully submitted,

MASON & GRAHAM,
COLLINS MASON,
WILLIAM R. GRAHAM,
By COLLINS MASON,
Attorneys for Appellant.

RAY, QUINNEY & NEBEKER,
C. PRESTON ALLEN,
Of Counsel.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

COLLINS MASON



IN THE
United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

SOUTH BAY DAILY BREEZE, A DIVISION OF SOUTHERN
CALIFORNIA ASSOCIATED NEWSPAPERS, INC., *Respondent.*

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

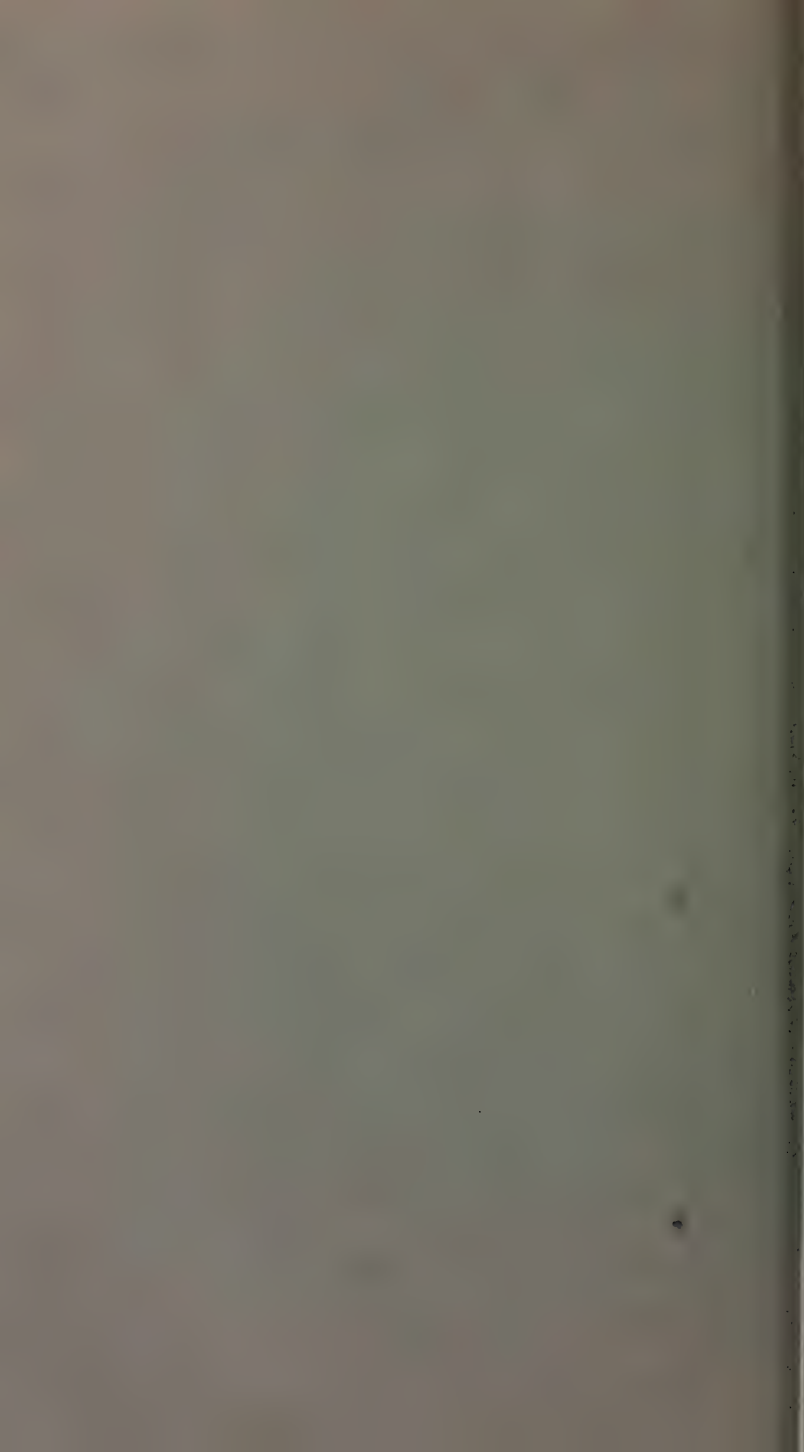
LAWRENCE M. JOSEPH,
J. RICHARD THESING,
Attorneys,
National Labor Relations Board.

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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 21949

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
SOUTH BAY DAILY BREEZE, A DIVISION OF SOUTHERN
CALIFORNIA ASSOCIATED NEWSPAPERS, INC., *Respondent*.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

DEPUTY ATTORNEY GENERAL FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order issued on October 12, 1966, against the South Bay Daily Breeze, A Division of Southern California Associated Newspapers, Inc.,¹ hereafter referred to as "the Company" or "Respondent." The order was

The Southern California Associated Newspapers, Inc., is owned by the Copley Press which owns 10 newspapers in Southern California and 5 in Illinois (Tr. 779).

issued following the usual unfair labor practice proceedings under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). The Board's decision and order (R. 143-44)² are reported at 160 NLRB No. 145

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(1) of the Act by threatening employee with blacklisting, loss of benefits and discharge because of their union activities, by promising and granting wage increases in order to discourage union activities, by giving employees the impression of surveillance of union activities, and by interrogating employees regarding their union activities. The Board also found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain collectively with the Union³ and by unilaterally granting wage increases to employees. The facts upon which these findings are based are set forth below.

A. A Majority of Editorial Employees Join the Guild But the Company Refuses the Guild's Request for Recognition

The Company publishes a daily newspaper, the South Bay Daily Breeze, in Torrance, California. C

² References to the pleadings reproduced as Volume I, Pleadings are designated "R". References to the stenographic transcript of the hearing filed with the Court are designated "Tr." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. References designated "G.C. Exh." or "R. Exh." are to exhibits of the General Counsel and respondent, respectively.

³ Local 69, Los Angeles Newspaper Guild, American Newspaper Guild, AFL-CIO, CLC, hereafter referred to as "Guild" or "Union".

April 21 or 22, 1965,⁴ Loel Schrader, an international representative for the Guild, was informed by a Guild member that editorial employees of the Company were interested in union representation (R. 68; Tr. 21-22, 4). On Friday, April 23, Schrader met with employees Gillis, Rinehart, and Butkus and discussed with them the advantages of Guild representation (R. 68; Tr. 4, 60). He then told the employees how to go about getting representation; that membership cards would be needed from at least 30 per cent of the employees in order to get a Board election; that it was possible to get recognition without an election if a majority became members but that the Guild would want at least 70 per cent of the employees signed up before it would try to get representation without an election (R. 68; Tr. 47-48). The three employees then signed authorization cards and it was agreed that Gillis and Rinehart would solicit the remaining employees during the weekend (*ibid*). By Sunday evening 12 more cards were turned over to Schrader thus giving him a total of 15 cards—a majority of the 25 employees in the unit (R. 68; Tr. 26, 52-54).⁵ Schrader then sent the following telegram to the Company requesting recognition:

Editorial dept. employees of the South Daily Breeze have designated the Los Angeles Newspaper Guild as their representative for the pur-

All dates refer to 1965 unless otherwise noted.

Following a representation hearing in which the eligibility of certain employees was litigated, the Regional Director, on June 30, decided that there were 25 employees in the unit. Prior to that time the Guild had taken the position that the unit consisted of 20 employees while the Company sought to have 28 employees included in the unit (GCX 1(d)).

pose of bargaining collectively for improved wages, hours and other terms and conditions of employment. The Guild requests that it be granted recognition as bargaining representatives for editorial dept. employees. In the event you do not voluntarily grant recognition the Guild will insist that a secret ballot election be conducted among all eligible employees by the National Labor Relations Board. The Guild expects that the Daily Breeze will continue to act in a gentlemanly fashion and employees will not be impeded in their exercise of free choice by threats, interrogation or promises. In this regard the Guild calls your attention to appropriate sections of the Labor Management Relations Act. Any attempts by the Daily Breeze to go beyond the proper bounds of pre-election conduct will be dealt with swiftly by the Guild's legal dept. The Guild's only concern is that eligible employees be given an opportunity to act, speak and vote in accordance with their own free consciences and without fear of retaliation from either party (R. 69; G.C. Exh. 7).

On Monday, April 26, Schrader filed a representation petition with the Board, and on the following day respondent received notification from the Regional Office of the Board of this fact (R. 69; Tr. 795, G.C. Exh. 1(a)).

On April 27, 1965, Robert L. Curry, publisher and editor of Respondent dispatched the following telegram to Schrader:

In response to your telegram of April 26, I wish to advise you that the South Bay Daily Breeze declines to recognize your union as the collective bargaining representative of any of its employees.

because it genuinely doubts that your union represents a majority of its employees in any appropriate bargaining unit. We further believe that the proper way to resolve these questions is through a secret ballot election conducted under the provision of the National Labor Relations Board provided you meet the requirements of the National Labor Relations Board for such an election (R. 69; R. Exh. 12).

The next day, April 28, Schrader visited Curry at his office and told him that he represented the employees in the editorial department (R. 69; Tr. 34-35). He referred to a previous election to have the Guild represent the circulation department and suggested that they could avoid the bitterness and disruption of an election campaign by agreeing at that point to sit it down and negotiate a contract (R. 69; Tr. 35). Curry replied that the matter was entirely out of his hands as it had been turned over to counsel (R. 69; Tr. 35). Curry added that he doubted that the Guild represented a majority of the employees (R. 69; Tr. 35).

B. The Election Campaign: Company Officials Interfere With, Restrain and Coerce the Employees in Order To Defeat the Guild in the Election.

1. News Editor Kenneth Johnson

On April 26, shortly after the Company received the telegram from the Guild, Johnson approached Gillis and asked him if he was "with him or against him" (R. 71; Tr. 74-76). When Gillis said that he did not understand, Johnson asked if he had signed a petition; Gillis answered that he had not (R. 71; Tr. 76). Johnson then related that his father had been a union

organizer and that he knew their tactics and that these things had turned him against unions in general. He also said that Gillis would not like working with the Guild because it would ruin the paper (*ibid.*).

Later that day, Johnson showed the telegram to employee Patricia McDonnell, women's editor, and asked if she were one of the people responsible for it (R. 71; Tr. 470-71). Johnson stated that he felt it was a personal affront and that he had been stabbed in the back; that employees responsible for it were cowards and should have at least given him some warning that they were going to try to get the Guild in (R. 71; Tr. 471-72).

Approximately one week later, McDonnell and Johnson had another conversation regarding the Guild (R. 71; Tr. 473). This conversation took place after working hours in a lounge known as the Lama Room located near the Company's building (*ibid.*). McDonnell told Johnson that she was trying to be neutral but that she would be tempted to vote for the Guild simply to protect employees Lorraine Geittmann, Gary Gillis, and Robert Jones who were known to be Guild leaders (R. 71; Tr. 473-474). Johnson replied that if the Guild got in things would be tough on them (*ibid.*). He continued, "you know how Lori [Geittmann] is late all the time (R. 71; Tr. 475). We just change her hours, and I will have her come in at 5:00 in the morning, and you know how long it would take before Lori is being late. We could dismiss her after a week." As to Robert Jones, he stated, "You know what an old maid he is about his routines and his schedules all we have to do is put him on a split shift, and he couldn't take that very long" (*ibid.*). On this occasion or shortly thereafter McDonnell asked Johnson how

he could "get" everyone since there were so many employees, and not all were outspoken (R. 71; Tr. 475-476). Johnson replied, "Now, Patty, we have ways; we have ways" (R. 71, Tr. 476).

In a later conversation in the Lama Room, Johnson told McDonnell that she would have to have faith in Curry's statement that the salary inequities at the Company would be corrected (R. 71; Tr. 477). Johnson said he couldn't tell her what her salary would be because he could go to prison if he did, but he promised to write it down on a slip of paper and give it to her the next day (*ibid.*).

In the middle of May, Johnson also told employee Eugene Hall that he was going to show him a slip of paper some time before the election indicating what his salary would be if the Guild were voted out (R. 71; Tr. 315-316).⁶ In early June, Johnson asked Hall to do him a personal favor and not attend the Guild meeting that night. Hall stated that he would not go, and he did not. (R. 72; Tr. 317-328, 346).

2. Robert L. Curry, publisher, Charles Wahlheim, production manager and consultant to publisher, and Robert Paffin⁷

In mid-May, Curray asked McDonnell if she had any grievances or was unhappy about anything (R. 72;

⁶ During the campaign, Johnson prepared for publisher Curry and other supervisors a list of employees with his evaluation of their stand on the Guild. As to Hall, he reported, "Sees dollar signs, thinks he's better and worth more than he is. Is very impressionable. Listens to me a lot, and a last minute promise of more money from me would weigh heavily on his decision . . . He is the kind you worry about selling the day of the election" (R. 71; G.C. Exh. 18).

⁷ Paffin is employed by the Company's parent corporation and is admittedly an agent of the Company (R. 72; Tr. 833-835).

Tr. 490-92). She replied affirmatively, mentioning that the woman's editor for another newspaper in the area was making \$25 a week more than she even though McDonnell had two employees under her and the other woman had none (R. 72; Tr. 492-93). Curry answered that he had been so busy with the construction of the new building that he had not been aware of how much the salaries were lagging and he assured her that the inequities would be taken care of. He also said that if she had not made up her mind as to how she would vote, that he hoped that she would listen to his side of the story (*ibid.*). About June 21, Curry called McDonnell into his office and told her that she would get a raise of \$15 a week on July 1, and that "after this [union] thing is settled" her salary would be comparable to others in the area (R. 72-73; Tr. 494).

In mid-May, during a conversation in which Hall consulted Curry about co-signing a bank note for him, Curry asked Hall how he stood "in this Guild thing" (R. 73; Tr. 320). When Hall replied that he was 100 percent with the Company, Curry complimented him and went on to say that he would know how people voted in the election and that promotions would go to those who voted against the Guild (R. 73; Tr. 321). Curry then agreed to sign for the loan and told Hall that he had a tremendous future with the Company (R. 73; Tr. 322). He then told Hall that he was determined to defeat the Guild and that he would appreciate anything Hall might do to help. In an effort to comply with this request, Hall, a few days later, supplied Curry with a list of employees and how he thought they would vote (*ibid.*). On July 20, the day of the election, Curry approached Hall and said that he understood that Guild representative Schrader was

at his home the night before and that Hall had called Schrader the day before (R. 73; Tr. 323). Curry said that Johnson and Moon were worried that Hall was going to vote against the Company but that he felt sure that Hall was merely stringing along with the Guild to supply Curry with further information (R. 73; Tr. 323-324). Although Hall replied to Curry that he was correct, he testified at the hearing that he was not, in fact, stringing the Guild along (*ibid.*).

Curry held staff meetings with employees in the editorial department on June 10 and 22 and July 14 and 16, to discuss the Guild (R. 73). He told them that he was very shocked to be notified that his employees were seeking Guild representation; that he thought they were a family group and that his door had always been open to anyone who had any complaints. He said that he had become aware of inequities and that they would be rectified, but he could not give specific details because he did not want "to end up in jail." He stated that he, Managing Editor Moon and Executive Editor Samuel Stewart had gone over the specific things that would be done to eliminate the inequities (R. 73; Tr. 248-250, 391-394, 397). He told them that there would be no firings because of the Guild (R. 73; Tr. 520).

At the June 10 meeting Charles Wahlheim, production manager and consultant to the publisher⁸ stated that a union contract would require strict application

⁸ On July 13, Wahlheim's position was changed from production manager to consultant to the publisher in labor relations and production matters. In both positions he negotiated and administered contracts with labor unions representing respondent's employees. The Company has contracts with the International Typographer's Union, the International Stereotyper's Union and with the International Pressmen's Union (R. 73; Tr. 1139-1140).

of rules and regulations while absence of a contract would permit more laxity (R. 73-74; Tr. 394-395). As an example, he told of a senior production employee who had an accident on the job and could not work for a considerable period of time. He said that the Company did not pay sick leave or disability because the union contract did not require it and the Company was afraid of establishing a precedent. (R. 74; Tr. 1140-41.) Amplifying Walheim's remarks, Curry then stated that in the editorial department, if an employee came to work drunk, the company probably would give him a break but that election of the Guild would cause management to be on one side and the employees on the other and would put an end to the family feeling that had existed. Thus, he continued, if they were under a Guild contract and an employee were tardy three times, the Company would have to fire him, because if it did not, it would be setting a precedent and would not thereafter be able to fire anyone for being tardy (R. 74; Tr. 403). He also warned that it might take six months to negotiate a contract (R. 8; Tr. 396).

In the latter part of June, Curry took Peterson to lunch and while there he told him that the Guild was for people who needed a crutch and that he did not understand why a person with Peterson's background would want to join (R. 74; Tr. 594-96). He also said that newspaper companies check with one another concerning applicants: "We also check whether you had any Guild leanings, and a lot of publishers do not like to hire people that had Guild leanings, you know, and this may go bad with you" (R. 75; Tr. 597-98).

About two weeks before the election, Curry told employee Inez Staff that he was very disturbed by "all this Guild fuss" and that he realized that it had a very disrupting influence on the employees: that he realized there were inequities but that he meant to see that they were corrected (R. 75; Tr. 628). He stated that he hated to see the Guild get in because it would destroy the family relationship in the editorial department. (R. 75; Tr. 629.) He told Staff, "Well, you know, we publishers have our organization, too, and if any of those young fellows try to get a job and he has been active in trying to get the Guild in here, we publishers have our own ways of letting each other know that he just wouldn't be a desirable fellow to hire" (*ibid.*).

In mid-June, Curry called employee Gillis into his office. (R. 75; Tr. 84, 87.) He stated he did not question Gillis' part in the Guild, but that the Guild is an irresponsible union and he would show him proof as to why he should change his mind (R. 75; Tr. 84, 87). He told him that raises would be given as part of their salary review whether or not the Guild represented the employees and that after the election there would probably be other raises (*ibid.*). Curry promised to take care of certain inequities that had been brought to his attention. (R. 75; Tr. 87.)

On June 28, two weeks before the election, 23 out of the 25 employees in the unit received wage increases (R. 84; G.C. Exh. 25).

On about July 13, Robert Paffin told McDonnell that he had worked many years on the side of unions in New York and had worked many years on management's side and that if the Guild got in, he would

participate in contract negotiations, and stated, "I know every trick in the book, and we will hold this up for one year, until another election is due" (R. 75; Tr. 499-500).

3. John C. Moon, managing editor

In a telephone conversation with employee Gillis on the evening of May 31, Moon said that if the Guild won the election it would have rules that the Company would have to abide by; one was that if a person is tardy three times, the Company would have to fire him (R. 77; Tr. 76-78). He mentioned that employee Geittman had been tardy on many occasions (R. 77; Tr. 78). He stated that the Company has a lot of heart and the Guild would take this away (R. 77; Tr. 79).

In a conversation in mid-June, Moon told McDonnell that since the Guild agitation had started, they were going to have to make all the salaries at respondent comparable to other newspapers of the same size, and therefore he would be paying the women's editor \$165 or \$170 a week (*ibid.*).⁹ Then he stated, "Therefore, Pat, you make one slip-up, and you will be out, because I can hire anyone I want to at that kind of money" (R. 78; Tr. 485).

A week or two before the election of July 20, Moon told McDonnell that there were five or six employees, including her, who were fence sitters (R. 78; Tr. 485-486). He stated he could not understand why they did not stand up and say whether they were for or against the Guild, or how they were going to vote

⁹ McDonnell was then earning \$120 per week.

(R. 78; Tr. 487). Moon brought the matter up on several occasions (*ibid.*).

On the day of the election Moon told Hall that if the Guild won the election, Hall, Randy Gray and Lori Geittmann would be fired as a result of a more stringent application of work rules (R. 78; Tr. 332).

About three weeks before the election, Moon asked employee Peterson, "What is this I heard about you being pro-Guild"? (R. 78; Tr. 589-590). Peterson asked who had told him this and Moon replied that a number of employees were compiling lists of those for and against the Guild and that everyone who had checked in with him had reported that Peterson was pro-Guild (R. 78; Tr. 591, 598, 1063). He asked Peterson, "How come you have not approached me on this Guild thing? You are the quietest fellow in the house" (R. 78; Tr. 1064). They then discussed Peterson's goals and his future (R. 78; Tr. 591-593). Moon told him that newspapers keep in contact with each other regarding job applicants and if he wanted to go to another paper for a job, the other paper would probably want to know his background and if they found out about his Guild leanings, they might not want to hire him. (R. 78-79; Tr. 591-592).

In mid-June, Moon and several employees discussed the Guild during a coffee break. (R. 77; Tr. 79-81). Moon suggested that they could form their own union and not have to pay dues, and he recommended use of a suggestion box for employee complaints or suggestions; he stated that since this would solve many of their problems, they would not need the Guild. (*ibid.*). He told them that their salaries would be reviewed

in June and that they were all going to get raises and that after the Guild was defeated they would continue to receive raises (R. 77; Tr. 82).

In early May 1965, Moon told employee McDonnell that employee Erickson had a fine career ahead of him and that it would be too bad if he got mixed up with the Guild because anyone who has been a Guild agitator or a Guild supporter would never get into a managerial position, and that this was the case at the Company's newspaper in San Diego, California, where the Guild represents the employees (R. 77-78; Tr. 480-481).

Later that month, Moon called McDonnell into his office and reprimanded her because she reported for work late that morning. He said that if the Guild and the federal government were not breathing down his back, he would fire her (R. 78; Tr. 482-485). He then handed her a letter about her tardiness that morning, told her this was evidence that she had been late, and stated that if the Guild got in, "three times late, Pat McDonnell, and you will be out on the streets" (R. 78; Tr. 484). McDonnell testified that she has frequently been late to work but that she had never missed a deadline (*ibid.*).

C. The Election

The election, held on July 20, resulted in a tie vote (R. 70; G.C. Exh. 1(p)). Shortly thereafter, the Guild filed timely objections to the conduct affecting the results of the election (R. 68; G.C. Exh. 1(h)). At the same time the Guild filed the instant charges alleging violation of Section 8(a)(1) and (5) (R. 1; G.C. Exh. 1(j)). The two cases were consolidated herein (R. 68; G.C. Exh. 1(r)).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the Company violated Section 8(a)(1) of the Act by interrogating employees about their union activities, threatening them with discharge, blacklisting and lack of opportunity for promotion to managerial positions because of those activities, promising wage increases and other benefits, and granting wage increases to discourage union activities, soliciting an employee not to attend a union meeting, giving employees the impression of surveillance of their union activities and threatening employees with a stringent and heartless application of work rules if the Guild won the election. (R. 85). The Board also found that the Company violated Section 8(a)(5) of the Act by refusing, in bad faith, to recognize and bargain collectively with the Guild, by unilaterally granting wage increases to employees (R. 85), and by threatening to delay bargaining after the election (R. 76).

The Board ordered the Company to cease and desist from the unfair labor practices found and from interfering in any other manner with the employees' rights under the Act. Affirmatively, the Company was ordered to bargain upon request by the Guild and to post the appropriate notices (R. 86).^{9a}

^{9a} In the representation case, consolidated herein, the Board found merit in the Guild's objections to the election and set it aside.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY INTERFERED WITH, RESTRAINED AND COERCED ITS EMPLOYEES IN THE EXERCISE OF THEIR STATUTORY RIGHTS, IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

The record reveals that upon learning of the Guild's majority status, the Company initiated a comprehensive campaign of interrogation, threats of reprisal, promises and granting of benefits, all designed to intimidate and influence the employees to renounce their association with the Guild. Thus, news editor Johnson,¹⁰ managing editor Moon and publisher Curry questioned several employees about whether they were for or against the Guild. Curry and Moon told employees that Guild supporters would not be promoted to managerial positions and several times threatened that pro-Guild employees would never get another job in the newspaper industry because the "news-

¹⁰ There is no merit to respondent's contention that Johnson is not a supervisor. This issue was fully litigated in the representation hearing and the Regional Director found that Johnson was a supervisor since he "possesses and exercises the authority to assign stories to reporters, review their work, request the rewriting of stories, assign overtime, grant time off and discipline employees. He coordinates the operations of about 5 other staff members of the news department. He also regularly fills in for Managing Editor Moon, an admitted supervisor" (G.C. Exh. 1). At the unfair labor practice hearing respondent was given an opportunity to introduce any new or previously unavailable evidence on this issue but failed to do so. Under these circumstances the Board did not abuse its discretion by adopting the Regional Director's decision. *Amalgamated Clothing Workers of America (Sagamore Shirt Co.) v. N.L.R.B.*, 365 F. 2d 898, 905 (C.A. D.C.).

In any event respondent, in this case, is responsible for Johnson's conduct whether he was a supervisor or not, for the record is clear that "the other employees had justifiable cause for believing that [he] was acting for and on behalf of management when [he] did the acts in question." *Betts Baking Co. Inc. v. N.L.R.B.*, 380 F. 2d 199, 202 (C.A. 10).

papers keep in contact with each other regarding job applicants" and "a lot of publishers do not like to hire people that had Guild leanings" (Tr. 591-92, 597-98). Similarly, Johnson told an employee that the Company would find out how the employees voted and that, if the Guild got in, things would be tough on those who voted for it.

Moon and Curry also gave employees the impression that their union activities were under the Company's surveillance. Thus, about three weeks before the election Moon approached employee Peterson and said that he had heard that Peterson was for the Guild. When Peterson denied it and asked who had said so, Moon replied that a number of employees were compiling lists of those for the Guild and those against it and that everyone had reported that Peterson was pro-Guild. Moon then proceeded to coercively question and threaten Peterson about his union sympathies. Then, on election day, Curry approached employee Hall and said that he understood that Guild representative Schrader was at his house the night before and that Hall had called Schrader the day before. He also said that if the union won, Hall, Gray and Geittmann would be fired.

Furthermore, as shown in the Statement, the Company repeatedly promised salary increases to its employees during the election campaign, informing some that "inequities" would be corrected after the Guild matter was settled, and making more specific promises to McDonnell and Hall.¹¹

¹¹ Shortly after Johnson promised a wage raise to Hall on the condition that the Guild lose the election, he approached Hall and asked him, as a personal favor, not to attend a Guild meeting that evening. The Board, in agreement with the Trial Examiner, correctly found that this was also a violation of Section 8(a)(1). *N.L.R.B. v. Kit Mfg. Co.*, 292 F. 2d 686, 690 (C.A. 9).

That the foregoing conduct by the Company constituted unlawful interference, restraint and coercion within the meaning of Section 8(a)(1) of the Act is clear beyond doubt.¹² Before the Board the Company did not argue that this conduct does not violate Section 8(a)(1). Rather, the Company's sole argument was that the Trial Examiner should have credited its witnesses and not the employees.¹³ This argument, made in the face of the Trial Examiner's careful and detailed credibility resolutions, (R. 69, 72, 76) is clearly without merit. In rejecting this very argument in similar circumstances, this Court recently said:

We must give great weight to the credibility findings of the Trial Examiner. *N.L.R.B. v. Local*

¹² Interrogating employees about their union sympathies: *N.L.R.B. v. Luisi Truck Lines*, 66 LRRM 2461, 2462 (C.A. 9), decided October 27, 1967; *N.L.R.B. v. Security Plating Co.*, 356 F. 2d 725, 728 (C.A. 9); *N.L.R.B. v. Ace Comb Co.*, 342 F. 2d 841, 843-44 (C.A. 9). Threatening reprisals for union activities: *N.L.R.B. v. Ace Comb Co.*, *supra*; *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F. 2d 705, 708 (C.A. 9); *N.L.R.B. v. Ambrose Distributing Co.*, 358 F. 2d 319, 320-31 (C.A. 9), cert. denied, 385 U.S. 838; *N.L.R.B. v. Kit Mfg. Co.*, 292 F. 2d 680, 690 (C.A. 9). Creating the impression of surveillance: *N.L.R.B. v. Security Plating Co.*, *supra*; Promising benefits during election campaign: *N.L.R.B. v. Security Plating Co.*, *supra*; *N.L.R.B. v. Kit Mfg. Co.*, 292 F. 2d 686, 690 (C.A. 9).

¹³ The Company did make an alternative argument with respect to one of the instances of 8(a)(1) conduct. It argued that Johnson's statement to McDonnell that the Company would find out who voted for the Guild and make things tough on them was not coercive because it came up in a casual conversation at a bar after working hours. There is no merit to this contention. The statement is coercive on its face and its impact is not lessened because it was made in a bar. Moreover, the bar in question, the "Lama Room", was the location of most of the pre-election campaigning by both the Guild and respondent. And Johnson had, in prior conversations with McDonnell in the Lama Room, made coercive and threatening statements in connection with the Guild.

776, *IATSE (Film Editors)*, 303 F. 2d 513, 518 (9th Cir. 1962), *cert. denied*, 371 U.S. 826 (1962). "This court does not sit to parrot the Board's conclusions, but neither does it sit to judge the credibility of witnesses . . . or dispute the Board's choice between two fairly conflicting views although this court might justifiably make a different choice were the matter before it *de novo*." *N.L.R.B. v. Stanislaus Implement & Hardware Co.*, 226 F. 2d 377, 381 (9th Cir. 1955). This is not to say that we are irrevocably bound by the credibility determinations of the Trial Examiner, but rather that his findings shouldn't be disturbed unless a clear preponderance of all of the relevant evidence convinces that they are incorrect. We have examined the record and have not found ample reason for reversing the credibility finding. We therefore affirm the Board's findings of a violation of section 8(a)(1). [footnote omitted]

N.L.R.B. v. Luisi Truck Lines, *supra*, 66 LRRM at 2462-2463.

There is also substantial evidence to support the Board's finding that remarks by four management officials that working rules would be heartlessly and vindictively administered constituted a violation of Section 8(a)(1) of the Act. The employer did not merely advise his employees that he would require strict adherence to work rules. The remarks of Curry and Walheim (*supra*, pp. 9-10), when considered with those of Johnson and Moon, make it clear that the employer was informing the employees that the rules would be manipulated so that pro-Guild employees would violate them and be discharged. Thus Johnson told McDonnell that if the Guild got in things would be tough on Guild leaders Geittman, Gillis and Jones.

Johnson explained “. . . you know how Lori [Geittman] is late all the time. We just change her hours, and you know how long it would take before Lori is being late. We could dismiss her after a week.” As to Robert Jones, he stated, “you know what an old maid he is about his routines and his schedules; all we have to do is put him on a split shift, and he couldn’t take that very long.” (R. 71; Tr. 474-475.) In a written report submitted by Johnson to Curry giving his appraisal of employees’ feelings on the Guild, he suggested that employee Randy Gray might be convinced to vote for the Company with the selling point that “Guild rules will cost you your jobs” (G. C. Exh. 18). Managing Editor Moon told McDonnell that the Guild would take the heart out of the employer-employee relationship and that if she was late 3 times after the Guild got in she would be fired. Moon told employee Hall that he, Gray and Geittmann would be fired after the Guild got in because work rules would be more stringently applied. In short, the Company’s warnings to the employees that work rules would be used to discharge pro-Guild employees violate Section 8(a)(1).¹⁴

It is also settled that conferring economic benefits in order to inhibit employee’s freedom of choice violates Section 8(a)(1). *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405. Here 23 of the 25 employees in the unit received salary increases of \$5 to \$15 per week shortly before the election. The Board’s con-

¹⁴ *N.L.R.B. v. Sebastopol Apple Growers Union*, 269 F. 2d 705, 708 (C.A. 9): “If you girls think I am tough now, wait; if the Union gets in, I’ll show you how tough I can be,” found violative of 8(a)(1). Accord: *Edward Fields, Inc. v. N.L.R.B.*, 325 F. 2d 754, 670 (C.A. 2).

clusion that the purpose of the increases was to influence the employees is plainly warranted. Thus, it is clear from both Company and Union witnesses that wages were the primary concern of the employees, and the employer knew it; the memorandum from Johnson to Curry (see p. 7, n. 6 *supra*) which discussed the union sentiments of the employees suggested that for several employees a raise in pay would sway their sentiments away from the Guild.¹⁵ And, as shown, *supra* pp. 7, 8, 9, 11, 12, 13-14, many promises of wage raises had been made to the employees during the election campaign. The company's true motive is most clearly revealed by company agent Paffin's statement to McDonnell that "the main issue in this Guild thing has been money, and now that is settled, or soon will be, there is really not much sense in bringing it in is there" (Tr. 533).

In sum, the Board properly concluded that the Company granted these wage increases "for the purpose of interfering with, restraining and coercing employees in the pending representation election." (R. 18). *J. C. Penny Co. Inc. v. N.L.R.B.*, August 29, 1967, 66 LRRM 2069, 2073 (C.A. 10); *American Sanitary Products Co. v. N.L.R.B.*, 382 F. 2d 53 (C.A. 10); *Betts Baking Co. v. N.L.R.B.*, 380 F. 2d 199, 203 (C.A. 10); *Crown Tar and Chemical Works, Inc. v. N.L.R.B.*, 365 F. 2d

¹⁵ Respondent contends that this document should not have been admitted into evidence because it was allegedly stolen from a supervisor's desk. Respondent relies on the dissenting opinion in *Burdeau v. McDowell*, 256 U.S. 465. But the decision in that case holds that allegedly stolen documents are admissible unless an agent of the government was a party to the wrongful seizure. The Board, of course, follows this rule in its proceedings. *General Engineering, Inc.*, 123 NLRB 586; *Air Line Pilots Ass'n*, 97 NLRB 929; *Andrew Jergens Co. of Calif.*, 27 NLRB 521. In any event, the information in the memorandum is merely cumulative.

588, 590 (C.A. 10); *United Automobile Workers (Preston Products Co., Inc.) v. N.L.R.B.*, — F. 2d — (C.A.D.C. No. 20, 137, decided November 14, 1967), Slip opinion pp. 7, 8.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

Section 8(a)(5) of the Act requires an employer "to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a)." Section 9(a) provides that "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." Although Section 9(c)(1) provides the machinery by which the selection of a representative may be determined in a Board-conducted election, it has long been settled that an election is not the only means by which representative status may be established. See *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72, and cases cited at n. 8 therein. It is equally well settled that where authorization cards have been signed by a majority of the unit employees, the employer violates Section 8(a)(5) of the Act if he refuses to recognize and bargain with the union, unless such refusal is motivated by a good-faith doubt of the union's majority status. We show below that a majority of the employees in an appropriate unit validly designated the Union as their bargaining representative and that the Company refused recognition, not because of good-faith doubt of the Union's majority status, but to gain

time in which to undermine that status. *N.L.R.B. v. Security Plating Co., Inc.*, 356 F. 2d 725, 727 (C.A. 9); *N.L.R.B. v. Hyde*, 339 F. 2d 568, 570 (C.A. 9); *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F. 2d 902, 908-909 (C.A. 9), cert. denied, 379 U.S. 961, rehearing denied, 380 U.S. 926; *Colson Corp. v. N.L.R.B.*, 347 F. 2d 128 (C.A. 8), cert. denied, 382 U.S. 904; *N.L.R.B. v. Economy Food Center, Inc.*, 333 F. 2d 468, 471-72 (C.A. 7); *Florence Printing Co. v. N.L.R.B.*, 333 F. 2d 289, 291-92 (C.A. 4); *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 182 (C.A. 2).

A. The Guild Had Majority Status in An Appropriate Unit

1. The Trial Examiner correctly precluded the Company from relitigating in the unfair labor practice proceeding the supervisory status of certain employees

On April 26, the Guild filed a representation petition, seeking an election in a unit of "all regular editorial department employees" (G.C. Exh. 1(a)). The Company contended, *inter alia*, that six employees¹⁶ were not supervisors and should, therefore, be included in the unit. A three-day hearing was held to determine the status of the employees. The Regional Director then issued a Decision and Direction of Election in which he held that three¹⁷ of the six employees were supervisors and, therefore, not included in the unit. The Company did not request the Board to review this

¹⁶ Sports Editor Richard White, Women's Editor Patricia McDonnell, Photographer Robert Moore, City Editor Jay Berman, News Editor Kenneth Johnson and Assistant News Editor Gary Palmer.

¹⁷ Berman, Johnson and Palmer.

determination¹⁸ but, instead, executed a waiver of its right to appeal (G.C. Exh. 1(b)). Accordingly, pursuant to the terms of the Regional Director's decision, employees Berman, Johnson and Palmer did not vote in the ensuing election.¹⁹

At the hearing before the Trial Examiner, the Company sought to litigate again the status of employees Berman, Johnson and Palmer. The Trial Examiner, relying upon Board Rule 102.67(f), rejected this attempt.²⁰ The Company's contention that it should have been allowed to relitigate the status of those employees is based upon its argument that the present unfair labor practice proceeding is not "related" to the representation proceeding within the meaning of Rule 102.67(f). As we show below, this contention is without merit.

It is well settled that determinations made in a representation case are not directly reviewable in the courts.²¹ However, where the Board orders an employer to bargain with a union, and its order "is

¹⁸ Section 102.67(b) of the Board's Rules and Regulations, 29 CFR 102.67, provides for Board review of the Regional Director's Decision.

¹⁹ As noted *supra*, p. 14, the election resulted in a tie vote, the Union filed objections to the Company's conduct affecting the result of the election, and that case was consolidated with the instant unfair labor practice case.

²⁰ Board Rule 102.67(f), 29 CFR 102.67(f) provides that "The parties may at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding"

²¹ See, e.g., *Boire v. Greyhound Corp.*, 376 U.S. 473, 476; *A.F.L. v. N.L.R.B.*, 308 U.S. 401.

based in whole or in part'' (Section 9(d))²² upon determinations made in the representation proceeding, an employer may obtain judicial review of the entire representation proceeding by refusing to bargain with the union. Because in such cases, the representation case is a part of the record, and therefore reviewable by the Court (Section 9(d)), one opportunity to litigate an issue is considered sufficient and there is no right to litigate again, in the unfair labor practice hearing, what has already been litigated in the representation case.²³ The Company acknowledges this analysis, but would limit its application to the situation where the Union *wins* the election, is certified, and the employer refuses to bargain to test the certification. There is, we submit, no reason in law or policy for such a limitation.

Section 9(d) makes no distinction based upon whether a union wins or loses the election.²⁴ Thus,

²² Section 9(d) of the Act provides:

Whenever an order of the Board made pursuant to Section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

²³ *N.L.R.B. v. International Union of Operating Engineers Local 66, etc.*, 357 F. 2d 841,846 n. 10 (C.A. 3) and cases cited therein.

²⁴ In addition to the reasons set forth, *infra*, pp. 25-26, we note, as the Board found, that the Union's election loss was attributable to the employer's unfair labor practices. There is surely no reason to allow the employer to relitigate an issue because he has caused the Union to lose the election, when it is clear he would not have been permitted to do so had he obeyed the law.

where, as here, the Union loses an invalid election and the Board then issues a bargaining order, the employer may still obtain court review of the determinations made in the representation case insofar as the Board's order is based upon those determinations.²⁵ Here the Board's order plainly rests, at least in part, upon the Regional Director's determination that three employees were supervisors, and therefore not eligible for inclusion in the unit. In seeking to relitigate the status of these employees, the Company did not allege that it had new or previously unavailable evidence to offer. It sought merely to introduce the same evidence, in order to litigate the same issue for the same purpose—to contest again the proper composition of the bargaining unit. However, since the issue has already been litigated in the representation case, and since the Board's bargaining order is based in part upon the resolution of this issue, making that determination reviewable in the court of appeals (Section 9(d)), there is no reason to allow the same issue to be litigated again, on the same evidence, for the same purpose.²⁶

²⁵ The Board has certified the representation case record to this Court for its review herein. See, in this regard, *N.L.R.B. v. Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851, 853-54 (C.A. 1).

²⁶ *Amalgamated Clothing Workers of America v. N.L.R.B. (Sagamore Shirt Co.)*, 365 F. 2d 898 (C.A.D.C.) is distinguishable. There, the Court held that supervisory status of certain employees could be relitigated in a subsequent unfair labor practice case because the status of the employees was important for a reason quite apart from any issue involved in the refusal to bargain charge. In such a case, it could be said that a party is not on notice of, and should not be required to anticipate, any *additional* consequences of losing an issue which he has intended to litigate only for election purposes. Thus, where, "... the part of the charge involved in the relitigation issue is not refusal to bargain, but rather, interference with rights of organization, the proceedings are not so

2. The Company's failure to file exceptions to the regional director's decision precludes it from attacking that decision in this court

As shown, *supra*, pp. 23-24, the Company did not file exceptions to the Regional Director's decision disposing of the supervisory status of certain individuals. Instead, the Company filed a waiver of its right to have the Board review the Director's decision, and the election was held pursuant to the terms of that decision. We submit, for the following reasons, that the Company's failure to seek review by the Board of the Regional Director's decision, precludes it from obtaining judicial review of that decision.

Section 10(e) of the Act provides that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This section consistently has been held to apply where an issue was litigated before the Trial Examiner in an unfair labor practice proceeding, but not renewed before the Board by means of timely exceptions to the Trial Examiner's Decision. *N.L.R.B. v. International Union of Operating Engineers Local 66, etc.* 357 F. 2d 841, 846 n. 10 (C.A. 3); *N.L.R.B. v. Guistina Bros. Lumber Co.*, 253 F. 2d 371, 374 (C.A. 9). These holdings go beyond a literal reading of Section 10(e), since the Trial Examiner might well be considered an "agent" of the Board. However, it was recognized that if the Board could properly require

related as to foreclose presentation to the Board of the underlying issue." 365 F. 2d at 905. On the other hand, "the rule [against relitigation] is clear enough where the Company seeks to justify an alleged refusal to bargain on the ground that the earlier unit determination is incorrect." 365 F. 2d at 904.

timely exceptions to the Trial Examiner's Decision as a precondition to Board consideration of contentions raised before the Trial Examiner, then Section 10(e) of the Act must be interpreted to preclude judicial consideration of findings to which no exceptions have been filed. A contrary interpretation of Section 10(e) would "virtually destroy" the Board's procedural rule, for the "Board could hardly continue to consider only those issues in the Intermediate Report [now called "Trial Examiner's Decision"] to which formal exception is taken if the Courts are going to review every thing raised before the Hearing Examiner." *Kovach v. N.L.R.B.*, 229 F. 2d 138, 143 (C.A. 7).

Preclusion of judicial review of the finding made by the Regional Director here involves but another application of this principle. The Company did not seek review of the Regional Director's decision as the Board's rules provided it might. Since the Company elected not to take issue with the Director's determinations an election was held in accordance with those determinations.²⁷ In these circumstances, we submit that the Company should be deemed to have waived any attack on the Regional Director's determinations and this Court may appropriately decline to pass upon them. *N.L.R.B. v. Delsea Iron Works, Inc.*, 334 F. 2d 67, 71 (C.A. 3).²⁸

²⁷ If the Company had not filed a waiver of its right to review, the Regional Director would not have conducted an election until the Company's objections were reviewed by the Board. See Rule 102.67 (b).

²⁸ Although the Third Circuit in *N.R.L.B. v. Capital Bakers, Inc.*, 351 F. 2d 45, 48, rejected the Board's contention that failure to follow prescribed procedures to overturn the Regional Director's unit determination was a waiver of the exceptions thereto, the court found that the circumstances there were "special"—i.e.,

Nor may the Company properly contend that it fulfilled its Section 10(e) obligation by attempting to establish the alleged error in the Regional Director's decision in the complaint proceeding. As shown, *supra*, pp. 24-26, with respect to the status of the employees, the representation and unfair labor practice proceedings are one. Accordingly, asserted error at any stage of the proceedings must be preserved in compliance with prescribed procedural requirements. These requirements serve to insure that matters involved in representation proceedings are brought to the Board's attention at a time when they may be resolved with the least delay and prejudice to all concerned. This, in turn, aids the quick and final resolution of representation issues and protects the employees' right to choose or reject a bargaining representative in an expeditious fashion. Here, the Company was fully apprised of its right to request review of the Regional Director's decision. Had it done so, the election would not have been held until the Board ruled on the Company's objections, and if it agreed with those contentions the election would have been held in the unit considered appropriate by the employer. There is surely no reason why that representation issue should not have been finally settled in the representation case, rather than in the complaint case, long after the election had been held. Nor is there a claim that extraordinary circumstances excused the failure to file exceptions at the

exceptions to the Board would have been futile since the Board's unit position had been established in prior litigation, the intervening Supreme Court decision in *N.L.R.B. v. Metropolitan Life Ins. Co.*, 380 U.S. 438, had cast doubt on the validity of the Board's position, and the respondent had maintained "his position from the inception of the proceedings, and the Board had been adequately apprised of his intention to rely on this." Cf. *N.L.R.B. v. Sun Drug Co.*, 359 F. 2d 408 (C.A. 3).

appropriate time as required by the Board's rules. Accordingly Section 10(e) of the Act precludes judicial review of the Company's defense.

Furthermore, the Company's failure to exhaust an available administrative remedy precludes review here irrespective of the application of Section 10(e) of the Act. *N.L.R.B. v. Rexall Chemical Co.*, 370 F. 2d 363, 365-366 (C.A. 1). In *Rexall*, as in this case, the employer failed to take exception to the Regional Director's report, attempted, unsuccessfully, to relitigate the issue in the unfair labor practice proceeding and then sought judicial review, claiming error by the Regional Director. The Court precluded review, applying the doctrine of exhaustion of administrative remedies, ". . . a long and well established general rule of law resting upon considerations of fairness and orderly procedure." *Rexall, supra*, 370 F. 2d at 366. Quoting from the Supreme Court's decision in *United States v. Tucker Truck Lines*, 344 U.S. 33, 36-37, the Court pointed out that:

Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that Courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under the practice.

As we have shown, there is no reason why the Company could not have filed timely objections to the Regional Director's decision. Since it chose not to do so, it may not press its claim in this Court.

3. The authorization cards are valid

It is well settled that an employee's execution of a clear and unambiguous card, such as the one in the present case,²⁹ constitutes an effective designation of

²⁹ The cards read as follows:

AMERICAN NEWSPAPER GUILD (AFL-CIO, CLC) MEMBERSHIP APPLICATION

I designate the American Newspaper Guild and its Local my agent in collective bargaining, and authorize the American Newspaper Guild and its Local to represent me before any Board, Court, Committee or other Tribunal in any matter involving collective bargaining, and I authorize the American Newspaper Guild and its Local to represent me in adjusting any grievances I may have in connection with my employment. I pledge myself to abide by the constitution of the American Newspaper Guild and the Bylaws of the Local Guild.

Name
(please print) (Date of birth) (Home phone)

Home Address

.....
(Employed by) (Date of hire) (Present salary)

.....
(Department in which employed) (Job title)

Application received by Local Guild

Herewith \$. initiation fee and \$. for
month's dues

Date Signature

(The ANG constitution requires that, when turned into the local Guild, this card be accompanied by an initiation fee and one month's dues; where a dues deduction agreement is in effect, a signed checkoff card may be accepted instead of the month's dues.)

[OVER]

Have you previously been a member of the American Newspaper Guild, any of its locals, or any other union? If so, please state when and where:

Please list all previous experience in newspaper or comparable work, giving city, company, job title and dates:

Please check those Guild activities in which you would like most to participate:

- ☐ Contract negotiations
- ☐ Contract enforcement
- ☐ Organizing
- ☐ Budget, dues collection
- ☐ Inter-union relations

- ☐ Education, publications
- ☐ Human rights
- ☐ Legislation
- ☐ Social affairs awards

the union as his bargaining agent, unless the employer can make a clear showing that the employee signed the card because of a material or gross misrepresentation of its purpose. *United Automobile Workers (Preston Products Co., Inc.)*, F. 2d (C.A.D.C.), No. 20,137, decided November 14, 1967; *N.L.R.B. v. Gotham Shoe Mfg. Co.*, 359 F. 2d 684, 686 (C.A. 2); *N.L.R.B. v. Security Plating Co.*, 356 F. 2d 725, 726-727 (C.A. 9); *Happach v. N.L.R.B.*, 353 F. 2d 629, 631 (C.A. 7); *N.L.R.B. v. C. J. Glasgow Co.*, 356 F. 2d 476, 478 (C.A. 7); *Englewood Lumber Co.*, 130 NLRB 394, 395; *Jas. H. Matthews & Co. v. N.L.R.B.*, 354 F. 2d 432, 437-438 (C.A. 8), cert. denied, 384 U.S. 1002. Cf. *N.L.R.B. v. Swan Super Cleaner, Inc.*, decided October 25, 1967, 66 LRRM 2385 (C.A. 6). Contra: *N.L.R.B. v. S. S. Logan Packing Company*, — F. 2d — (C.A. 4), No. 10,355, decided October 27, 1967. "A morass of hazy individual recollections of attendant circumstances will not suffice." *Amalgamated Clothing Workers of America (Hamburg Shirt Corp.) v. N.L.R.B.*, 371 F. 2d 740, 745 (C.A.D.C.). Where, as here, the cards clearly state their purpose, full effect will be given to them, regardless of the subjective state of mind of the signatories, absent proof of fraud or coercion in obtaining the signatures.³⁰

Strong reliance on the clear terms of an authorization card is especially appropriate in this case. The employees involved had a college education. As company counsel observed, "the more educated a person,

³⁰ "[A]n employee's thoughts (or afterthoughts) as to why he signed a union card and what he thought that card meant, cannot negative the overt action of having signed a card designating the union as bargaining agent." *Joy Silk Mills v. N.L.R.B.*, 185 F. 2d 732, 743 (C.A.D.C.), cert. denied, 341 U.S. 941. Accord: *Colson Corp. v. N.L.R.B.*, 347 F. 2d 128, 135 (C.A. 8), cert. denied, 382 U.S. 904; *N.L.R.B. v. Winn-Dixie Stores, Inc.*, 341 F. 2d 750, 755 (C.A. 6), cert. denied, 382 U.S. 830; *N.L.R.B. v. Stow Mfg.*, 217 F. 2d 900, 902 (C.A. 2), cert. denied, 348 U.S. 964; *N.L.R.B. v. Greenfield Components Corp.*, 317 F. 2d 85, 89 (C.A. 1).

the less likely they would be induced or coerced" (Tr. 261). As newspaper reporters, they are members of a profession skilled in the use and understanding of language, and in the ability to "ferret out the truth" (Tr. 262). These employees admittedly read and signed the clearly worded authorization cards which were captioned, in capital letters: MEMBERSHIP APPLICATION. On the other hand, the testimony upon which the Company relies to invalidate the cards occurred nine months after they were signed; the employees in question were still employed by the Company; and they were not likely to have forgotten their employer's threats to blacklist Guild supporters, or other threats, promises and inducements designed to force abandonment of the Guild. Appropriate in such circumstances, is the recent observation of the District of Columbia Circuit:

. . . we have here the classic case of employees testifying under the eye of the company officials about events which occurred almost a year before and prior to the activities which were subsequently found to constitute unfair labor practices. It is certainly conceivable that those same threats and benefits which shook an employee's original support for the union also altered that employee's memory as to events which occurred before the presentation of such threats and benefits.

United Automobile Workers (Preston Products Co., Inc.) v. N.L.R.B., *supra*, Slip opinion p. 10. Accord: *N.L.R.B. v. Southbridge Sheet Metal Works*, 380 F. 2d 851, 855 (C.A. 1).³¹

³¹ In the *Preston Products* case, as here, extensive threats were made and almost all of the employees received pay increases during the election campaign. Judge Wright's observation in *Preston* that "Surely the Board might well conclude that in the real world employer blandishments and coercion amounting to unfair labor practices during an election campaign can result in tailored testimony" (*Preston*, *supra*, at n. 2, p. 11) is equally applicable here.

Here, the Board found that when the Guild demanded recognition it held 14 valid authorization cards, giving it a majority of the 25 employees in the unit. The Company contests six of the cards. As we shall show, the evidence is clearly insufficient to show that the cards were signed because of a material misrepresentation with respect to their purpose.

Floyd Rinehart

Rinehart knew that the Guild could achieve representation without an election. Indeed, his testimony is explicit: "... had there been sufficient cards signed to influence Mr. Curry to agree to a contract negotiation with the Guild as a bargaining agent, without an election, then we would not have to go through a campaign. But ... it was not my thinking ... that it was ever going to be that easy." (Tr. 715). Thus, Rinehart believed that there would be an election—not because of any misrepresentation made to him—but because the employer would not grant recognition without one. Moreover, Rinehart's activities on behalf of the Union made it plain that in signing the card he "meant to make the Union [his] representative." *N.L.R.B. v. Stow Mfg. Co.*, 217 F. 2d 900, 902 (C.A. 2), cert. denied, 348 U.S. 964. See also, *N.L.R.B. v. Hyde*, 339 F. 2d 568 (C.A. 9). He made the initial contact with the Guild, and acted "as an unofficial agent of the union in trying to get cards signed for the union ... " (Tr. 715). Thus, his actions at the time of the events in question were consistent with his testimony that he signed a card because he wanted the Guild to represent him (Tr. 715).

Robert Peterson

Peterson testified that Gillis, in soliciting his card, clearly informed him that, "if we get enough cards signed, we probably won't even have to have an election. Mr. Curry can probably, you know, say okay . . ." (Tr. 605). And when asked by Company counsel, "Didn't [Gillis] say the only purpose in signing the card was to have an election?", Peterson responded, "No. The purpose in signing the card is to be represented by the Guild." The Company's claim of misrepresentation is based on statements by Gillis that Mr. Curry probably would not grant recognition without an election, and that signing the card did not commit one to vote for the union *if* there was an election (Tr. 606, emphasis added). This, of course, is not a misrepresentation, but an accurate reflection of the union's expectations. Gillis' full disclosure with respect to the card's purpose, and the fact that representation could be obtained solely on the basis of authorization cards, completely refutes the Company's claim of misrepresentation.

Randolph Gray

Gray testified that he read the card before signing it, and knew that it could be used to obtain recognition without an election (Tr. 742-743). Although Gillis had, in urging Gray to sign, told him that he was trying to bring about an election, this falls far short of a representation that the card would not be given its stated effect. The mere mention of an election in connection with a solicitation to sign is not sufficient to vitiate the clear and unambiguous designation of a bargaining representative. See, *e.g.*, *Amalgamated Clothing Workers of America (Sagamore Shirt Co.) v. N.L.R.B.*, 365 F. 2d 898, (C.A.D.C.); *United Auto-*

mobile Workers (Preston Products Co., Inc.) v. N.L.R.B., supra; N.L.R.B. v. Cumberland Shoe Corp., 351 F. 2d 917, 920 (C.A. 6); Cf. N.L.R.B. v. Swan Super Cleaners, supra, 66 LRRM 2385 (C.A. 6). Gillis did not indicate that there would *necessarily* be a later opportunity to decide whether or not to designate the Union and, as noted, *supra*, Gray knew what he had signed and its effect. His later testimony that he wasn't "convinced" that he wanted the Guild when he signed the card is surely not evidence of a misrepresentation made to him. See n. 30, *supra*. Nor does his affirmative response to a leading question as to whether the sole purpose of the card was stated to be to get an election change the fact that Gray admittedly read the card and knew that it could be used to obtain representation without an election.³²

Charles Cole

The Board found that the purpose of the card was misrepresented to Cole. However, after considering all the circumstances surrounding his signing, the Board concluded that he was not induced to sign the card because of the misrepresentation but because he

³² Affirmative answers to leading questions used by Company counsel, e.g., "Were you told that the only purpose of signing the card was to obtain a Labor Board election?" are entitled to little probative weight. In *N.L.R.B. v. Cumberland Shoe Corp.*, 351 F. 2d 917, 919 (C.A. 6) the Court, quoting the Board decision in that case, stated:

"The record indicates that the testimony * * * [that some signatories were told that the purpose of the cards was to obtain a Board election] consisted of affirmative responses by the signatories to leading questions propounded by Respondent's counsel, upon cross-examination, as to whether they were told that the purpose of the cards was to secure an election. We do not deem such testimony sufficient to controvert the statement of the purpose and effect of such cards contained on the face thereof, nor do we consider it inconsistent with an understanding that the cards served the dual purpose of designating a representative and of securing an election."

wanted the Guild to represent him (R. 83). Thus, Cole, a former member of the Guild, was approached by Gillis who persuaded him of the advantages of the Guild. Cole testified that “[Gillis] made a pretty good argument for the Guild, and when he left I was pretty well sold on what they were trying to do” (Tr. 648). Cole not only filled out and signed the authorization card, but volunteered to participate in Guild activities (G.C. Exh. 12). Then, during the early part of the election campaign Cole actively supported the Guild (Tr. 659). In sum, the Board’s conclusion that Cole signed the card because he wanted Guild representation rather than because of the misrepresentation made to him is warranted on this record.

Richard Baylor

Baylor’s card was solicited by Rinehart, who told him of the benefits the Guild would bring. Since Baylor was most concerned about wages, Rinehart stressed the differences between the Company’s current wages and the Guild’s scale. (Tr. 763, 765, 769-770). Baylor then read the card and signed it (Tr. 763). Baylor also testified that Rinehart told him the card would be used to petition for an election but could not say whether Rinehart said that was the only purpose of the card (Tr. 761). Baylor knew that the card could be used to obtain recognition without an election but could not remember if Rinehart told him so at the time he signed. In sum, all that Baylor’s testimony establishes is that there exists a “morass of hazy . . . recollections”³³ of the circumstances surrounding the signing of his card. This, we submit, falls far short of the

³³ *Amalgamated Clothing Workers (Hamburg Shirt Co.) v. N.L.R.B.*, 371 F. 2d 740, 745 (C.A.D.C.).

clear showing of misrepresentation necessary to invalidate a clear and unambiguous authorization card. See cases cited, *supra*, p. 32.

Donald Erickson

Erickson read the authorization card, filled it out, and signed it. He did so after Gillis approached him, and informed him that some of the employees were trying to get the Guild in; told him something about the Guild, and of the possible benefits that could be achieved by joining. (Tr. 672). Erickson also testified that Gillis told him that "he wanted to get as many cards as he could and this would show the Company that the employees were united, that they wanted better conditions, and the more cards the better . . . and Mr. Curry would know at least a majority or a large number of his employees were interested in bringing about the election or interested in exploring the idea further . . . or interested in having the Guild represent them" (Tr. 679-680). In sum, the evidence fails to show that Erickson executed the authorization card ~~and~~ because of a misrepresentation that its clearly stated purpose would not be given effect.

B. The Guild Made a Proper Request for Bargaining

As shown, *supra*, pp. 3-4, on April 26, the Guild sent a telegram to the Company informing it that the employees had designated the Guild as their representative. The telegram also stated that "the Guild requests that it be granted recognition as bargaining representative for editorial department employees". On the following day, the Company responded that it "declines to recognize your union as the collective bargaining representative of any of its employees."

Before the Board the Company argued that the Union's demand was technically defective because it did not state that the Union represented a "majority" of the employees, and because it did not offer a check of the authorization cards. But it is well settled that a request to bargain need follow no specific form as long as there is a clear communication of meaning, and the employer understands that a demand is being made.³⁴ Here, the Company's response plainly shows that it fully understood the Union's demand. In any event, the Company's belated, hypertechnical argument is without merit. The absence of the word "majority" in the Union's demand is not fatal. *Lincoln Mfg. Co. v. N.L.R.B.*, July 7, 1967, 65 LRRM 2913 (C.A. 7). Nor is the failure to offer a card check, *N.L.R.B. v. Security Plating Co.*, 356 F. 2d 725, 727 (C.A. 9). And, contrary to the Company's contention to the Board, "the filing of a representation petition does not absolve an employer from his duty to recognize and bargain with the Union . . ." *Bilton Insulation Inc. v. N.L.R.B.*, 297 F. 2d 141, 144 (C.A. 4). Finally, any defect in the Union's telegram was certainly cured by Schrader's visit to Curry two days later, when he again stated that he represented the editorial department employees and requested contract negotiations. Curry's response, as before, plainly shows that he understood that a demand had been made. See p. 5, *supra*.

³⁴ *N.L.R.B. v. Fosdal*, 367 F. 2d 784 (C.A. 7); *N.L.R.B. v. Barney's Supercenter, Inc.*, 296 F. 2d 91, 93 (C.A. 3); *Scobell Chemical Co. v. N.L.R.B.*, 267 F. 2d 922, 925-26 (C.A. 2); *Joy Silk Mills v. N.L.R.B.*, 185 F. 2d 732, 741 (C.A. D.C.), cert. denied, 341 U.S. 914.

C. The Company Had No Good Faith Doubt of the Union's Majority Status

Having obtained authorization cards from a majority of the employees in the unit, the Guild notified the Company that it represented the employees and requested recognition as bargaining representative. Under settled principles, the Company was thereupon required to recognize and bargain with the Guild unless the Company had a good faith doubt of the Guild's majority status.³⁵ As this Court recently stated:

The refusal [to bargain] may not be motivated by a desire to forestall collective bargaining and provide an opportunity to undermine the union's majority status and rid the Company of the union.

Security Plating, supra, 356 F. 2d at 727. Here, the record provides no basis for a claim of good faith. Rather, the Company's conduct, upon receiving the Union's request for recognition shows, we submit, that the Company credited the Union's claim that it represented the employees and then set out to destroy the Union's status. In any event, as this Court recently said:

Even if respondent had some doubts as to the majority status of the union, its entering upon an unlawful course of conduct in violation of section

³⁵ *N.L.R.B. v. Luisi Truck Lines, supra*, 66 LRRM at 2463; *N.L.R.B. v. Security Plating Company, Inc.*, 356 F. 2d 725, 727 (C.A. 9); *N.L.R.B. v. Hyde*, 339 F. 2d 568, 570 (C.A. 9); *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F. 2d 902, 908-909 (C.A. 9), cert. denied, 379 U.S. 961, rehearing denied, 380 U.S. 926; *Colson Corp. v. N.L.R.B.*, 347 F. 2d 128 (C.A. 8), cert. denied, 382 U.S. 904; *N.L.R.B. v. Economy Food Center, Inc.*, 333 F. 2d 468, 471-472 (C.A. 7); *N.L.R.B. v. Overnite Transportation Co.*, 308 F. 2d 279, 283 (C.A. 4); *Florence Printing Co. v. N.L.R.B.*, 333 F. 2d 289, 291-292 (C.A. 4); *Irving Air Chute Co. v. N.L.R.B.*, 350 F. 2d 176, 182 (C.A. 2); *Joy Silk Mills v. N.L.R.B.*, 185 F. 2d 732, 741 (C.A. D.C.), cert. denied, 341 U.S. 914.

8(a)(1) and clearly directed at undermining whatever support the union had, . . . indicates that such doubt, if any, was not the key motivating factor in its refusal to bargain. To the extent that respondent had any good faith doubts it apparently was not anxious to resolve them until such time as it could be sure that . . . the union would not have a majority. [footnote omitted].

N.L.R.B. v. Luisi Truck Lines, supra, 66 LLRM at 2463-2464.

We submit that the Company's conduct, *supra*, pp. 16-22, provides an ample basis for the Board's conclusion that the Company's true purpose in refusing the Guild's request for recognition was simply to defeat the Guild regardless of its majority status. *N.L.R.B. v. Luisi Truck Lines, supra*.³⁶

In these circumstances the Board concluded that a bargaining order was necessary to remedy the unfair labor practices. Clearly, such an order is an appropriate remedy for a refusal to bargain. *N.L.R.B. v. Luisi Truck Lines, supra*, 66 LLRM at 2464, and cases cited therein. The circumstances in *Luisi* are strikingly similar to those in the instant case. In *Luisi*, this Court once again noted that "the Board has wide discretion 'to determine how the effect of prior unfair practices may be expunged' *International Ass'n of Machinists*,

³⁶ Accord: *N.L.R.B. v. Joy Silk Mills, Inc.*, 185 F. 2d 732, 741 (C.A. D.C.), cert. denied, 341 U.S. 914; *N.L.R.B. v. Overnite Transportation Co., supra*, 308 F. 2d at 283; *Bilton Insulation, Inc. v. N.L.R.B.*, 297 F. 2d 141, 144-145 (C.A. 4); *N.L.R.B. v. Inter-City Advertising Company*, 190 F. 2d 420, 421 (C.A. 4), cert. denied, 342 U.S. 908; *Amalgamated Clothing Workers of America (Hamburg Shirt Corp.)*, 371 F. 2d 740 (C.A. D.C.); *N.L.R.B. v. Cumberland Shoe Corp.*, 351 F. 2d 917, 920-921 (C.A. 6); *N.L.R.B. v. Austin Powder Co.*, 350 F. 2d 973, 977 (C.A. 6); *N.L.R.B. v. Winn-Dixie, Inc.*, 341 F. 2d 750, 754-755 (C.A. 6), cert. denied, 382 U.S. 830.

etc. v. N.L.R.B., 311 U.S. 72, 82.” We submit that here, as in *Luisi*, there is nothing to indicate that the Board has abused its “wide discretion” in ordering the Company to bargain with the Union. “Were it otherwise, ‘recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of this statutory obligation’ *Franks Bros. Co. v. N.L.R.B.*, *supra*, 321 U.S. at 705” *N.L.R.B. v. Luisi Truck Lines*, *supra*, 66 LRRM at 2464.

CONCLUSION

For the foregoing reasons, we respectfully submit that a decree should be entered enforcing the Board’s order in full.

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NOVEMBER 1967

Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

REPRESENTATIVES AND ELECTIONS

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts

certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a

decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B**INDEX TO REPORTER'S TRANSCRIPT**

(Numbers are to pages of the reporter's transcript)
Board Case No. 31-CA-119

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1(a)-1(ff)	21	21	21
2	23	24	24
3	25	25	25
4, 5, 6	27	28	31
7	31	32	32
8	33	34	34
9	41		
10	65	66	66
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15	71	72	72
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17	73	74	74
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22	231	232	232
23	251		
24	252		
25	252		
26	333	375	375
27, 28	334	375	375

No.	Identified	Offered	Received in Evidence
29	390	390	390
30	409	409	438
31	441	442	517
32	443	443	517
33	444	444	517
34	496		
35	503		
36	503		
37	599	615	615
38	599		
39	630		
40	630		
41	654		

RESPONDENT'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1	196	196	196
2	210	210	210
3	211	1086	1087
4	347	347	348
5	358	358	358
6	372	378	378
7	504	516	517
7(a)-7(x)	510	516	517
8	536	1086	1087
9	567	568	569
10	570	570	570

No.	Identified	Offered	Received in Evidence
11	786	795	796
12	795	795	796
13	937	937	939
14, 15, 16, 17	994	998	999
18	1011	1011	1012
19	1017	1017	1018
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TRIAL EXAMINER'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1, 2	905	1009	1010
3	1010	1009	1010

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SOUTH BAY DAILY BREEZE, a Division of Southern
California Associated Newspapers, Inc.

Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board

RESPONDENT'S BRIEF

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FILED

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SOUTH BAY DAILY BREEZE, a Division of Southern
California Associated Newspapers, Inc.

Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Preliminary Statement

This is a proceeding, pursuant to Section 10(e) of the National Labor Relations Act, as amended (referred to herein as "Act") in which the National Labor Relations Board (referred to herein as "Board") is seeking to enforce an order against the South Bay Daily Breeze, a Division of Southern California Associated Newspapers, Inc. (referred to herein as "Respondent"), issued on October 12, 1966, and reported at 160 NLRB No. 145. (R. 143-144.)*

* References to the pleadings filed with the Court as Volume I, Pleadings, are designated "R". References to the stenographic transcript of the hearing in the representation case (31-RC-18) filed with the Court as Volumes II, III, and IV, are designated "RC Tr." References to the stenographic transcript of the unfair labor practice hearing (31-CA-119), filed with the Court as Volumes VI-XVI, are designated "Tr". References to exhibits of the General Counsel, Respondent, and the Trial Examiner are designated "GC Exh.", "R Exh." and "Tr. Exam. Exh." respectively.

The Board found that the Respondent had violated Sections 8(a)(1) and 8(a)(5) of the Act and had engaged in conduct affecting the results of a representation election held on July 20, 1965, in which Respondent's Editorial Department employees elected not to be represented by the petitioning union, Local 69, Los Angeles Newspaper Guild, American Newspaper Guild, AFL-CIO, CLC (referred to herein as "Guild"). The Board's order, *inter alia*, set aside the election and directed Respondent to cease and desist from engaging in certain unfair labor practices and to bargain with the Guild upon request.

That portion of the Board's order which requires Respondent to bargain with the Guild is premised upon the conclusion that at the time the Guild requested recognition, the Guild represented in an appropriate unit a majority of Respondent's editorial employees. Indeed, the Board has admitted that it does not have the power to issue a bargaining order unless the union involved did represent a majority of the employer's employees. See, *e.g.*, *J. P. Stevens & Co., Inc.*, 157 NLRB 869 (1966). In concluding that this requirement was met, the Board relies on its conclusion that 14 of Respondent's editorial employees signed valid union authorization cards and that the appropriate unit consisted of 25 employees.

Respondent, however, contends that the Board's bargaining order cannot be enforced in that the Guild did not represent a majority of Respondent's editorial employees in an appropriate unit. Respondent will demonstrate herein that at least six of its editorial employees signed union authorization cards under circumstances which require the court to disregard such cards as evidence of the employees' desire to be represented by the Guild in collective bargaining and that the appropriate bargaining unit consisted of 28 employees.

Respondent also contends that the instant case should be remanded on two crucial grounds. First, the Board should have required its General Counsel to show Respondent's counsel any written statements in his possession which were signed by employees whose authorization cards were introduced into evidence and which related to the circumstances surrounding the execution of such cards. Second, the Trial Examiner erroneously admitted into evidence a highly prejudicial document identified as General Counsel's Exhibit No. 18 which was stolen by an employee for use by the Guild and the General Counsel. Respondent does not believe that the Board's findings of certain unfair labor practices in violation of Section 8(a)(1) of the Act are supported by substantial evidence, but because the Trial Examiner's whole view of this case was so colored by General Counsel's Exhibit No. 18, it is submitted that instead of taking the time of this Court to review such findings and the record at this time, the interests of justice will best be served by remanding the Section 8(a)(1) allegations of the complaint to the Board for a hearing before another Trial Examiner whose views would not be colored by General Counsel's Exhibit No. 18.

Statement of Facts

Respondent is engaged in the publication and distribution of a daily newspaper and several weekly newspapers at its plant in Torrance, California. (R. 68; Tr. pp. 778-780.) For many years Respondent has had collective bargaining relationships with the International Typographical Union, the International Stereotyper's and Electrotyper's Union of North America, and the International Printing Pressmen and Assistant's Union of North America. (Tr. p. 790.) During this period there has never been a strike or serious labor dispute involving Respondent's employees. (Tr. p. 791.)

In 1962 the Guild attempted to organize the circulation employees of Respondent and claimed to represent a majority. Following a campaign, a majority of employees declined to select the Guild as their collective bargaining representative and the results of the election were certified. (R. 69-70; Tr. p. 792.)

In 1965 the Guild conducted a campaign to organize Respondent's editorial employees. (R. 68.) At a meeting on Friday, April 23, 1965, attended by the Guild's international representative Loel Schrader and three of Respondent's editorial employees, Gary Gillis, Floyd Rinehart and Alvin Butkus, it was decided to conduct an immediate card solicitation effort with the objective of obtaining a sufficient number of signed cards so that a petition for an election could be filed with the Board the following Monday. (R. 68; Tr. pp. 51, 104-105.)

Contrary to the allegation on page 3 of the Board's brief, the Trial Examiner did not credit Schrader's testimony that at this meeting he explained that it was possible to get recognition *without an election*, nor that the Guild would want 70 per cent of the employees signed up before it would seek recognition *without an election*. (R. 68, lines 52-57; R. 80, lines 32-40; Tr. pp. 697-699, 702-704, 707.) Instead, the Trial Examiner credited Rinehart's testimony that he did not recall any discussion about the possibility of the company agreeing to Guild recognition without an election and that Schrader told Rinehart that the cards indicated the employees were interested in the Guild and that they wanted an election. (R. 68, lines 52-57; Tr. p. 698.)

The Trial Examiner found that Gillis and Rinehart were key solicitors of authorization cards on behalf of the Guild. (R. 68.) They solicited cards from employees over the weekend of April 24-25 and by Sunday evening, April 25, a total of 15 cards had been obtained. (R. 69.)

On April 26 at 10:20 A.M., Respondent received a telegram from Schrader requesting recognition and, alternatively, advising Respondent that the Guild would insist on a secret ballot election conducted by the Board so that all employees could vote in accordance with their free consciences without fear of retaliation from either party. The telegram did not claim that the Guild represented a majority of Respondent's editorial employees, but simply stated that "[e]ditorial dept. employees" had designated the Guild as their representative. (R. 69.) At 1:29 P.M. the same day Schrader filed the petition in Case No. 31-RC-18. (R. 69; Tr. p. 60.)

On April 27, Respondent's publisher Robert Curry responded to Schrader's telegram advising him of his doubt as to the Guild's representative status and suggesting that a Board election was the appropriate way to resolve these questions. (R. 69.)

At a hearing conducted by the Board on the Guild's petition, the principal issue in dispute was the supervisory status of news editor Ken Johnson, city editor Steven Berman, assistant news editor Gary Palmer, sports editor Richard White, woman's editor Pat McDonald, and chief photographer Robert Moore. The Guild contended that all these employees were supervisors and Respondent contended that none of them were supervisors. The Regional Director determined that Johnson, Berman and Palmer were supervisors and the other three employees were not supervisors. (R. 8-9.)

An election was conducted which resulted in a tie vote. (R. 13.) Thereafter, the Guild filed objections to the conduct of the election and an unfair labor practice charge. These proceedings were consolidated for decision by the Trial Examiner and the Board. (R. 31.)

Substantial testimony at the hearing was directed to the question as to whether the Guild did in fact represent a majority of Respondent's editorial employees at any relevant time. As will be shown in detail in the argument herein, it is Respondent's position that the Guild did not have a majority since at least six of the 15 cards were invalid because the signers were led to believe by authorized representatives of the Guild that the cards would be used only to obtain an election. The Board affirmed the Trial Examiner's ruling rejecting one of the cards as a designation of the Guild as bargaining representative, but sustained the validity of the remaining 14. Respondent also contended throughout the proceeding that the appropriate bargaining unit should have consisted of 28 employees, rather than 25, with Johnson, Berman and Palmer being included in the unit as non-supervisory employees.

Questions Presented

1. Should authorization cards be deemed valid proof that a Union has been designated as the bargaining representative of employees where the signers of the cards were led to believe that the cards would be used only to obtain an election?

2. Were certain individuals improperly excluded from the bargaining unit used by the Board in determining whether the Guild represented a majority of the employees?

3. If the Board's General Counsel introduces authorization cards signed by employees as evidence of the Union's majority status, is the Employer's counsel entitled to examine any statements by such employees which are in the General Counsel's possession and which relate to the circumstances under which the cards were signed?

4. Did the Board err in permitting the introduction into evidence of a document stolen by an employee for use by the Charging Party and the General Counsel?

ARGUMENT

I. THE BOARD ERRED IN CONCLUDING THAT THE GUILD REPRESENTED A MAJORITY OF RESPONDENT'S EDITORIAL EMPLOYEES.

A. The Board Applied an Incorrect Standard in Determining the Validity of the Authorization Cards.

That portion of the Board's order requiring Respondent to bargain with the Guild upon request is premised upon the conclusion by the Trial Examiner, affirmed by the Board, that a majority of the editorial employees had designated the Guild as their bargaining representative at the time of the demand for recognition. In support of the claim of majority status, the General Counsel introduced 15 authorization cards into evidence. Respondent challenged the validity of the cards of Marx Ceder, Charles Cole, Donald Erickson, Floyd Rinehart, Richard Baylor, Randolph Gray and Robert Peterson on the ground that the cards were signed because these employees were led to believe by statements made by authorized representatives of the Guild that the cards would be used only for the purpose of obtaining an election. Respondent thus argued that these cards could not be construed as proof that these employees affirmatively desired to be represented by the Guild.

In determining the validity of the challenged authorization cards, the Trial Examiner observed that "evidence to vary the written and unequivocal designations by the employees on an authorization card is strictly construed and the Board has held that representations that the card is

‘to get an election’ is [sic] not a false representation or a misstatement of fact, but that a representation that the card is ‘only for an election’ is a misstatement of fact.” (R. 82.) He thus adopted the Board’s “only” rule which holds that an authorization card will not be invalidated on the grounds of a material misrepresentation unless the signer has been *expressly* told that the “sole” or “only” purpose of the card is to obtain an election. Under the rationale of this rule, the written language on the card authorizing the union to be the bargaining representative is not vitiated unless such words are used.

Applying this rule, the Trial Examiner found that such material misrepresentations had been made to two employees, Ceder and Cole. Accordingly, he rejected Ceder’s card and its rejection is not in issue before this Court. (R. 83.) The Trial Examiner, however, did not reject Cole’s card in spite of the misrepresentation because he found that Cole would have signed a card in any event. (R. 83.) He further found that the misrepresentations made to Erickson, Rinehart, Baylor, Gray and Peterson were not sufficiently material to warrant the rejection of their cards. The Trial Examiner’s findings and conclusions were upheld by the Board.

It is the position of Respondent in this Court that the Board erred in upholding the validity of the cards of Cole, Erickson, Rinehart, Baylor and Gray. Not only did the Board and the Trial Examiner use an incorrect standard, but, as will be discussed in a later section, the conclusions reached with respect to Cole and Erickson were erroneous even if the Board’s standard were applied.

It should first be noted that authorization cards are unreliable indications of employees’ desires even when such cards have not been procured through the use of mislead-

ing statements. For example, the Fourth Circuit has recently indicated that it will not even consider authorization cards as evidence of majority status. It is submitted that the following remarks by the court in *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967) demonstrate the danger inherent in using authorization cards as conclusive proof of employees' desires.

"It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check,' unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks. This, the Board has fully recognized. So has the AFL-CIO. In 1962, Board Chairman McCulloch presented to the American Bar Association data indicating some relationship between large card-signing majorities and election results. Unions which presented authorization cards from thirty to fifty per cent of the employees won nineteen per cent of the elections; those having authorization cards from fifty to seventy per cent of the employees won only forty-eight per cent of the elections, while those having authorization cards from over seventy per cent of the employees won seventy-four per cent of the elections. This suggests that the greater the majority of authorization cards, the greater the likelihood of a union election victory, but, obviously there are exceptions. Though ninety per cent of the employees may have signed cards, a majority may vote against the union in a secret election. Overwhelming majorities of cards may indicate the probable outcome of an election, but it is no more than an indication, and close card majorities prove nothing.

“The unsupervised solicitation of authorization cards by unions is subject to all of the criticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited alone and in private, will sign an opposing petition, in each instance, out of concern for the feelings of the solicitors and the difficulty of saying ‘No.’ This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees and of potentially powerful union organizers may weigh heavily in the balance.

“ . . .

“The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to avoid stands which appear to be nonconformist and antagonistic to friends and fellow employees. It is enhanced by the fact that usually, as they were here, the cards are obtained before the employees are exposed to any counter argument and without an opportunity for reflection or recantation. Most employees having second thoughts about the matter and regretting having signed the card would do nothing about it; in most situations, only one of rare strength of character would succeed in having his card returned or destroyed. Cards are collected over a period of time, however, and there is no assurance that an early signer is still of the same mind on the crucial date when the union delivers its bargaining demand.

“For such reasons, a card check is not a reliable indication of the employees’ wishes.” (386 F.2d at 565, 566.) (Footnotes omitted.)

The inherent unreliability of authorization cards is further increased when a card solicitor asks employees to sign authorization cards on the representation that the cards will be used to obtain an election. It is a fact of life that employees are often led to believe that the sole purpose of an authorization card is to obtain an election even if the words "sole" or "only" are not used. Such an impression may be created by the solicitor simply by stressing the need for an election and omitting mention of any other purpose. Contrary to the contentions of the Board, even employees who are college graduates can be so misled. This is especially true when one's signature is solicited by a friend, who also has a college education, who seems more knowledgeable in union affairs, and who states the cards will be used for a limited purpose. Thus, the Board's legalistic rule that there is a valid authorization by an employee unless the words "sole" or "only" have been uttered flies in the face of reality. It is therefore not surprising that this rule, applied by the Board in the instant case, has been rejected by the vast majority of courts of appeals.

For example, the Board's "only" rule was squarely rejected by the Second Circuit in *NLRB v. S.E. Nichols Co.*, 380 F.2d 438 (2d Cir. 1967). In that case, the Board refused to invalidate certain cards where the employees had been told that the cards would be used for an election but had *not* been told that an election was the sole purpose of the cards. Rejecting the cards, the court stated:

"The Board makes much of the supposed clarity of the cards used by the Union in this case, in contrast to the deceptive or ambiguous ones in other instances where it nevertheless upheld the union. [Citations omitted.] But while clarity should constitute the beginning of any effort to show a majority on the basis of authorization cards, it is

not the end; the clearest written words can be perverted by oral misrepresentations, especially to ordinary working people unversed in the 'witty diversities' of labor law. It is all too easy for the Board or a reviewing court to fall into the error of thinking that language clear to them was equally clear to employees previously unexposed to labor relations matters; to treat authorization cards, which union organizers present for filling out and signing and then immediately take away, as if they were wills or contracts carefully explained by a lawyer to his client is to substitute form for reality. The very argument by which the Board has upheld unions even when the cards were deceptively worded, namely, of placing 'more emphasis upon the representations made to the employees at the time the cards were signed than upon the language set forth in the cards,' *NLRB v. Winn-Dixie Stores, Inc.*, supra, 341 F.2d at 754, works against it here. In our view the evidence demands a conclusion that at least three of the signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election." (380 F.2d at 442-433.) (Footnote omitted.)

The court then distinguished its earlier decision in *NLRB v. Gotham Shoe Mfg. Co.*, 359 F.2d 684 (2d Cir. 1966) on the grounds that the employees in the *Gotham* case had been affirmatively told that the cards would be used to request recognition from the employer. Referring to the present case, the court stated:

"It is quite a different matter to permit a union to attain recognition by authorization cards procured on the affirmative assurance that there would be an election without a further clear explanation that the

cards can and may also be used to obtain recognition without any subsequent expression of preference by the employees; such a half-truth gives the employees the false impression that they will have an opportunity in all events to register their true preferences in the secrecy of the voting booth. As has been well said, Note, *supra*, 75 Yale L.J. at 826:

‘If the employee thinks the cards will lead to a secret ballot, he can insure himself against the possibility of future retaliation and prevent harassment only by signing. Such an employee may sign a card planning to vote against the union or at least intending to reserve decision until he hears the employer’s views or talks to fellow employees.’

We decline to encourage such an impairment of employees’ § 7 rights.” (380 F.2d at 445.) (Footnotes omitted.)

The *Nichols* decision has subsequently had a persuasive influence on other courts. The Sixth Circuit’s decisions in *NLRB v. Winn-Dixie Stores, Inc.*, 341 F.2d 750 (6th Cir. 1965) and *NLRB v. Cumberland Shoe Corp.*, 351 F.2d 917 (6th Cir. 1965) have frequently been cited by the Board as judicial approval of its “only” rule. However, in *NLRB v. Swan Super Cleaners, Inc.*, 384 F.2d 609 (6th Cir. 1967) the Sixth Circuit, relying on the *Nichols* case, expressly disavowed the “only” rule. In refusing to enforce a bargaining order, the court stated:

“We think it right now to say that we do not consider that we have announced a rule that only where the solicitor of a card actually employs the specified words ‘this card is for the *sole* and *only* purpose of having an election’ will a card be invalidated. We did not intend such a narrow and mechanical rule. We believe that whatever the style or actual words of

the solicitation, if it is clearly calculated to create in the mind of the one solicited a belief that the *only purpose of the card is to obtain an election*, an invalidation of such card does not offend our *Cumberland* rule.

“

“It appears that the examiner’s position was, and the Board’s position now is, that unless the solicitor has actually employed the words ‘sole’ or ‘only’ in his sales talk, our opinion in *Cumberland* insulates the solicitation from condemnation, no matter what its other vices. We do not believe the language employed in *Cumberland* suggests any such mechanical interpretation. The ‘outright misrepresentation’ referred to therein could certainly be accomplished by other words than ‘sole’ or ‘only’. A sophisticated and only modestly talented union agent could easily live with such a narrow rule and, leaving out the *bad words* — ‘sole’ and ‘only’ — employ language clearly calculated to lead a woman laundry worker to believe that the holding of an election was all that she signed up for.” (384 F.2d at 618, 620.)

The Seventh Circuit has also retreated from its previous approval of the “only” rule. In *NLRB v. Dan Howard Mfg. Co.*, F.2d, 67 LRRM 2278 (7th Cir. 1968), it stated:

“In the recent case of *NLRB v. Swan Super Cleaners*, No. 16952, 66 LRRM 2386 (October 25, 1967), the Sixth Circuit, through Judge O’Sullivan, explained its decision in *Cumberland* expressly disavowing the view that *Cumberland* held that the very word ‘sole’ or ‘only’ was needed to invalidate a card. The court adhered to *Cumberland*, saying that its rule is not offended by invalidating cards, no

matter what style or wording was used by the organizer 'if it is clearly calculated to create in the mind of the one solicited a belief that the only purpose of the card is to obtain an election.' The court pointed out that it is relevant to consider the subjective intention of the signer and his expressed state of mind in deciding whether a misapprehension was knowingly induced.

"We apply the restatement in *Swan* of the Cumberland rule and hold that 'in its total context' the only reasonable inference that can be drawn from the Weiner-Burdette colloquy, as testified to by her, is that statements made by Weiner created in Burdette's mind a misapprehension as to what signing the card meant and that her signature on the card did not represent an intention to designate the Union as her bargaining agent." (67 LRRM at 2280-2281.)

The Board's "only" rule has also received an unfavorable reception in the Eighth Circuit. In *Bauer Welding & Metal Fabricators, Inc., v. NLRB*, 358 F.2d 766 (8th Cir. 1966), the union had distributed authorization cards to the employees and had enclosed a letter stating that the cards would be used to obtain an election. Although the letter had not stated that this was the only purpose of the cards, the cards were nevertheless rejected by the court. The court stated:

"The emphasis throughout the letter is on the signing of the authorization cards, which would 'then', and not before, allow the Board to conduct an election to determine the representation question. We firmly believe the letter was designed for the purpose of, and succeeded in, creating the impression in the minds of the employees that the Union would become the bargaining agent only by winning an

election, and that the only purpose in signing the accompanying authorization card was to bring about such an election.” (358 F.2d at 774.)

The position of the Fifth Circuit is much the same as that of the Second, Sixth, Seventh and Eighth. Its view was most recently expressed in *Engineers & Fabricators, Inc. v. NLRB*, 376 F.2d 482 (5th Cir. 1967). There it stated:

“The Board has the same burdens and obligations as any other litigant who takes the affirmative, and must prove its charge. *NLRB v. Riverside Mfg. Co.*, 5 Cir., 1941, 119 F.2d 302. Therefore, the general counsel had the burden of showing that the cards authorized representation. Cf. *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 1960, 108 U.S. App. D.C. 68, 280 F.2d 616, *aff’d*, 366 U.S. 731, 81 S.Ct. 1603, 6 L.Ed.2d 762 (1961). When cards are challenged because of alleged misrepresentations in their procurement, the general counsel must show that the subjective intent to authorize union representation was not vitiated by such representations. Here the Board did not apply this legal standard. Instead it contends that

‘ . . . documents timely executed which unequivocally authorize a labor organization to act as the collective-bargaining agent of the signers must be treated as valid bargaining authorizations in the absence of a showing of coercion in their procurement or representations that “despite the purpose clearly and expressly stated on the cards themselves the cards would be used only for a different more limited purpose”. *Aero Corp.*, 149 NLRB No. 114, 57 LRRM at 1490.’

“This applies too lax a standard, and therefore the burden was not met.” (376 F.2d at 487.)

The Board has now been left with scant support for its "only" rule. The First Circuit in *NLRB v. Southbridge Sheet Metal Works, Inc.*, 380 F.2d 851 (1st Cir. 1967) has expressly stated that it found it unnecessary to go "so far as to say that a misrepresentation cannot ever vitiate a card when it is not proffered as the sole reason for signing." 380 F.2d at 856. In that case, a card was approved by the court where the signer had simply been told that there would be an election, but had *not* been told that the purpose of the card was to have an election. In *Furr's, Inc. v. NLRB*, 381 F.2d 562 (10th Cir. 1967), the Tenth Circuit gave lip-service to the Board's "only" rule, while at the same time questioning the validity of cards where the employees had been told that "there had to be an election first." Ironically, the Tenth Circuit cited in support of the "only" rule exclusively Second, Sixth, Seventh and Eighth Circuit cases. Every single one of these circuits has now openly rejected the "only" rule. The District of Columbia Circuit has given support to the "only" rule, but even that court has balked at the Board's mechanical application of the rule. See, *e.g.*, *Amalgamated Clothing Workers v. NLRB*, 365 F.2d 898 (D.C. Cir. 1966).

Only the Third and Ninth Circuits have yet to comment on the "only" rule. Although the Ninth Circuit has decided "card cases," it has found it unnecessary to come to grips with the rule. In *NLRB v. Security Plating Co.*, 356 F.2d 725 (9th Cir. 1966), the court found that the meaning and import of the cards had been carefully explained to the employees. In *NLRB v. Hyde*, 339 F.2d 568 (9th Cir. 1964), the employees had been informed that the cards would be used for a card check.

In conclusion, it can be seen that the vast majority of the courts of appeals which have reviewed the "only" rule has rejected it and has rather adopted a different

and proper test. As pointed out previously, the Second Circuit in the *Nichols* case invalidated cards where “the signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election.” In the *Swan* and *Howard* cases, cards were rejected by the Sixth and Seventh Circuits respectively where the solicitation was “clearly calculated to create in the mind of the one solicited a belief that the *only purpose of the card is to obtain an election.*” The Eighth Circuit in *Bauer* spoke in terms of creating the impression in the minds of the employees that the only purpose of the card was to bring about an election. In short, the correct test is whether the card solicitor, irrespective of the exact words used, led the signer to believe that the only purpose of the card is to have an election. In this respect, it should be noted that the subjective intent of the signer is relevant in determining whether the signer was misled and many of the courts of appeals have expressly so held. See, e.g., *Engineers & Fabricators, Inc. v. NLRB*, *supra*; *NLRB v. Swan Super Cleaners*, *supra*; *NLRB v. Dan Howard Mfg. Co.*, *supra*.

B. Even If the Board's Standard Is Correct, the Board's Findings of Fact Required That The Authorization Cards Signed by Cole and Erickson Should Have Been Rejected.

According to the findings of the Trial Examiner, adopted by the Board, a meeting was held on the evening of Friday, April 23, 1965, between the Guild's representative Schrader and three of Respondent's employees — Gillis, Rinehart and Butkus. At this first organizational meeting, the three employees signed authorization cards and were instructed to obtain authorizations from other employees over the weekend. This was done and two

nights later, on Sunday evening, April 25, 1965, Schrader had fifteen cards in his possession. Schrader then promptly dispatched his telegram to the Respondent. (R. 68-69.) It is submitted that the evidence as a whole with respect to this April 23, 1965 meeting, the findings of fact with respect to the statements made by the solicitors, and the telegram of the Guild stating that it would insist on an election and not stating that it represented a majority of the employees conclusively establish that the solicitation of all of the authorization cards was designed for the purpose of and succeeded in creating the impression in the minds of the employees that the Guild would become the bargaining representative only by winning an election and that the only purpose in signing the authorization cards was to bring about such an election. For this reason all authorization cards in this case should be disregarded.

In addition it will now be specifically shown that certain of the authorization cards were obtained only by misleading employees as to the purpose of the cards. In fact, the Trial Examiner himself rejected the card of Marx Ceder which was solicited by Gillis. He found that Gillis had told Marx Ceder, whose education consisted of three and one-half years of college, that the card was to bring about an election and that the authorization language on the card meant nothing. (R. 80.) Gillis also solicited cards from Cole, Erickson, and Gray.

Before considering the individual authorization cards challenged by Respondent, it should be observed that on page 33 of its brief the Board makes a blistering attack upon the credibility of the testimony of Cole, Erickson, Gray, Rinehart, and Baylor. The Board stated:

“On the other hand, the testimony upon which the Company relies to invalidate the cards occurred nine

months after they were signed; the employees in question were still employed by the Company; and they were not likely to have forgotten their employer's threats to blacklist Guild supporters, or other threats, promises and inducements designed to force abandonment of the Guild."

In seeking to invalidate these authorization cards the Respondent is relying primarily upon the findings of fact of the Trial Examiner. There was during the hearing considerable conflict in the testimony of the witnesses with respect to the circumstances surrounding the solicitation of these cards. Witness Gillis testified directly contrary to Cole, Erickson, Gray, and Rinehart with respect to material facts. Gillis was impeached in several respects by his own statement taken several weeks after the election. (Tr. pp. 142-145.) The Trial Examiner found the facts to be as stated by witnesses Cole, Erickson, Gray, Rinehart and Baylor. He therefore must have credited their testimony and not the testimony of Gillis. The Board adopted these findings of fact. It seems that by attacking the credibility of Cole, Erickson, Gray, Rinehart and Baylor, the Board is placed in the untenable position of attacking its own findings. This it cannot do. Moreover, it is also somewhat improper for the Board to criticize testimony because it was taken nine months after the events, while at the same time withholding from Respondent statements it took several weeks after the events. See Respondent's Argument II, page 41, et seq. Finally, it should be noted that, contrary to statements in the Board's brief, witness Rinehart was not employed by Respondent at the time of his testimony and had to be subpoenaed as a witness. (Tr. p. 694.) In addition, Cole and Baylor were also subpoenaed by the Respondent. (Tr. pp. 642, 758.)

The cards of Cole and Erickson will now be considered.

Charles Cole

The Trial Examiner made the following findings with respect to Cole which findings were adopted by the Board:

“Gillis solicited Cole’s card. After reading the printed matter on the card, Cole asked Gillis if he would be committing himself to vote for the Guild. Gillis replied, ‘Forget it;’ that it would not commit him to vote for the Guild or commit him to the Guild. Gillis stated that Gillis made a pretty good argument for the Guild, and when he left he was pretty well sold on what they were trying to do. Cole filled out the back side of the authorization card, indicating that he would be interested in serving on the negotiating committee for the Guild and the legislation committee, although Gillis told him it was not necessary for him to fill out this side of the card. Cole had been a member of the Guild on a prior occasion when employed by another newspaper. During part of the campaign, Cole was active on behalf of the Guild.” (R. 80.)

The seriousness of the aforementioned misrepresentation by Gary Gillis is more vividly demonstrated by the exact testimony of Cole:

“Then Gary showed me the card, and I read the card, and there was something at the top of the card that said I was — that literally said that I would be committing myself to the Guild; and I asked Gary about it, and he said to forget it.

“I asked him if it would commit me to voting for the Guild, and he said, ‘Forget it,’ and words to the effect it wouldn’t commit me to voting for the Guild or commit me to the Guild.” (Tr. p. 647, lines 7-14.)

Although the Trial Examiner found that Gillis had made a misrepresentation, he refused to invalidate Cole's card primarily because of the following testimony by Cole:

"I would say that Gary made a pretty good argument for the Guild, and when he left I was pretty well sold on what they were trying to do." (Tr. p. 648, lines 18-20.)

It should be noted that the latter statement is ambiguous at best. The phrase "on what they were trying to do" could well have referred to attempts to obtain an election. Furthermore, the term "pretty well sold" is ambivalent and certainly implies less than total conviction. The Trial Examiner also relied on the fact that Cole filled out the reverse side of the card and checked the blocks "contract negotiations" and "legislation." However, Cole testified that this was done *in the event* the Guild became the bargaining agent through an election. (Tr. p. 669.)

From this evidence, it appears that the Trial Examiner concluded that Cole was in favor of the Guild and that any misrepresentations as to the effect and purpose of the card were therefore immaterial. This, however, does not follow. Gillis expressly told Cole to forget the authorization language on the card, and such statement must be given the same effect as though Gillis had physically stricken the authorization language from the card. Thus, no effective authorization exists.

Interestingly enough, the Trial Examiner's acceptance of Cole's card was based on Cole's subjective intent. As has previously been mentioned, courts of appeals have found subjective intent relevant in determining the validity of authorization cards. However, the courts have focused their attention on subjective intent relating to purpose of the card and *not* on the employee's

thoughts as to the merits of the union. With respect to the former, Cole clearly testified that he did in fact believe that the card was “just for an election.” (Tr. p. 647.) Thus, it is clear that he was misled by the comments of Gillis and such subjective intent compels the rejection of the card and not its acceptance.

In conclusion, it is submitted that Cole’s card should be rejected even if the Court adopts the “only” rule. It is undisputed that Cole was told that the purpose of the card was only for an election and that the authorization language meant nothing. In addition, he was in fact misled by such misrepresentation. *A fortiori*, the card should be rejected under the test adopted by a majority of the courts of appeals.

Donald Erickson

The Trial Examiner made the following findings with respect to Erickson which findings were adopted by the Board:

“Gillis solicited Erickson’s card and told him about the Guild, the possibility of having it represent the employees in collective bargaining with Respondent and the possible benefits they could receive by joining the Guild. He told Erickson that the cards would bring about an election whereby all the employees could vote by secret ballot and determine through the election whether or not they wanted to be represented by the Guild and that he did not want Erickson to commit himself one way or the other at that time regarding his vote. Gillis stated that he wanted to get as many cards signed as he could and that this would show the Company that the employees were united and that they wanted better conditions; and the more cards, the

better. He stated that the cards would all be kept secret, but that the total number would be sent by telegram to the Respondent.¹¹

“¹¹Erickson testified he could not say that Gillis told him the card was ‘only’ for an election, although he said Gillis told him ‘that in so many words;’ but he testified that by the words used by Gillis he was ‘led to believe’ the sole purpose of the card was an election.”

The exact testimony of Erickson is as follows:

“THE WITNESS: Well, after he explained what the Guild was and the benefits would come about by bringing the Guild in, he told me that this card would be used along with several others that had been signed to bring about an election, and he did not want me to commit myself one way or the other at that time regarding a vote or anything.” (Tr. p. 674, lines 13-18.)

Erickson was not told that the card would be used for any purpose other than for an election. (Tr. p. 675.) In response to the question by the Board’s attorney as to whether he was told that the card was only for an election, Erickson stated, “Yes, he told me that in so many words.” (Tr. p. 676.)

The Board in its brief relies heavily on the following testimony of Erickson:

“Q. Did Mr. Gillis mention anything about a ‘show of force’?

“A. I think he did. I think he probably used those words.

“Q. Tell us what he said.

“A. Well, he wanted to get as many cards as he could, and this would show the Company that the

employees were united; that they wanted better conditions, and the more cards, the better." (Tr. p. 678, lines 9-15.)

This statement was further explained by Erickson in response to questions by the Board's attorney.

"A. Well, I think I have already said that the effect of the more cards the better and Mr. Curry, the Employer, would know at least a majority or a large number of his employees were interested in bringing about the election or interested in exploring the idea further.

"Q. Or interested in having the Guild represent them?

"A. Or interested in having the Guild represent them." (Tr. p. 679, line 21 — Tr. 680, line 2.)

Construing the last disjunctive phrase most favorably for the Board, the most that can be inferred is that some of the employees who signed cards were "interested" in the Guild. Indeed, it is probably true that employees who want an election are usually somewhat "interested" in the issue that will be voted upon. This does not mean, however, that they have yet made a decision with respect to that issue. This was, in fact, the case with Erickson as shown by the following question and answer:

"Q. So, you decided it would be a good thing, or at least your decision at that time was it would be a good thing to have the Guild represent the employee?

"

"A. THE WITNESS: Well, I was undecided at that time whether it was good or bad to have the Guild represent the employees, and I didn't know

at that time how I wanted to vote. The whole thing was very new to me. I remember in the back of my mind that I certainly didn't want to commit myself at that time one way or the other for a vote. And when he assured me that the card was to call an election, why, I understood then that I could decide later which way I wanted to vote." (Tr. p. 677, lines 6-8, 17-24.)

It can therefore be seen that Erickson was expressly told by Gillis that the latter did not want Erickson to commit himself one way or another at that time. Erickson was furthermore told by Gillis "in so many words" that the card was only for an election. Although Erickson believed that Respondent would be informed as to the number of cards that had been signed, he was led to believe that this would only demonstrate an interest on the part of the employees.

The foregoing demonstrates that Erickson's card should be rejected even under the Board's "only" rule in that Gillis discounted any commitment on the part of Erickson. In addition, the evidence shows that Erickson was in fact misled by Gillis' misrepresentations.

Certainly, the cards of Cole and Erickson should not be considered in determining majority status either under the Board's rule or under the rule adopted by most of the courts of appeals.

C. Applying the Correct Standard, the Board's Findings of Fact Required That the Authorization Cards Signed by Gray, Rinehart and Baylor Should Also Have Been Rejected.

Although the rejection of the cards of Cole and Erickson would be sufficient to demonstrate that the Guild did not represent a majority, three other cards should also be invalidated under the test approved by most of the courts of appeals. These cards will now be considered.

Randolph Gray

The Board adopted the following findings of fact made by the Trial Examiner with respect to the circumstances under which Gray's authorization card was executed:

"Gray's authorization card was solicited by Gillis. Gray had been a member of the Guild when employed by another newspaper. Gillis told him that he was trying to get signatures together to bring about an election for representation by the Guild, and that he thought all of the employees at Respondent would be better off with union representation, and he urged Gray to sign a card." (R. 81.)

The foregoing findings render it apparent that Gray was led to believe that he was signing a card only to bring about an election. Gray testified that this was in fact his sole intent in signing the card. (Tr. p. 747.) Indeed, no other purpose had been mentioned. (Tr. p. 741.) The statement on page 35 of the Board's brief that Gray "admittedly read the card and knew that it could be used to obtain representation without an election" is not correct. The relevant testimony is as follows:

"Q. Didn't he say that if things went as well as they had been going, they would be sitting down at the bargaining table with Mr. Curry?

“A. I believe he showed some optimism, as far as he was concerned in bringing about an election.

“Q. You knew, didn’t you, that Mr. Curry could capitulate and could just recognize the union without an election, didn’t you know that?

“A. I believe I was aware of that.” (Tr. p. 742, line 20 — Tr. p. 743, line 3.)

It is obvious that an employer can capitulate in any election campaign and Gray’s answer is a mere acknowledgement of this fact. The crucial issue, however, is the effect of the cards and there is no evidence that Gray was aware that the cards could be used to compel such a capitulation. There is furthermore no evidence that he obtained such knowledge in San Pedro where he was required to be a Guild member under a union shop provision. (Tr. p. 746.)

From the foregoing, it can be seen that Gillis again followed his consistent pattern of creating the impression that the cards would be used only to obtain an election and for no other purpose. This falls squarely within the scope of the conduct condemned by the courts of appeals. Gray’s card should therefore be rejected in that he was led to believe by the remarks of Gillis that the only purpose of the card was to have an election.

Richard Baylor

The Board adopted the following findings of fact made by the Trial Examiner with respect to the circumstances under which Richard Baylor executed an authorization card:

“Rinehart solicited Baylor’s card and talked to him about the situation at Respondent and stated

that some of the employees had gotten together and decided to see if the Guild could straighten the situation out; he explained that the Guild needed a certain percentage of signatures of the employees in the editorial department in order to file a petition with the Board requesting an election. He asked Baylor to sign and he did." (R. 80.)

The only logical inference which can be drawn from the foregoing finding of fact by the Trial Examiner is that Baylor could reasonably conclude that the purpose of the card was solely to bring about an election. No other purpose was mentioned and Rinehart specifically informed Baylor that a certain percentage of signatures were needed to file the election petition.

On page 37 of its brief, the Board states that "Baylor knew that the card could be used to obtain recognition without an election but could not remember if Rinehart told him so at the time he signed." This statement by the Board incorrectly implies that Baylor knew this fact at the time he signed the card. Baylor, however, testified that he could not remember whether at the time he signed the card he knew that the card could be used to obtain recognition without an election. (Tr. pp. 763-764.)

From the Trial Examiner's finding, it can be seen that Rinehart's remarks were clearly calculated to cause Baylor to believe that his card would be used for an election and for no other purpose. The mere speculation that Baylor *might* have known that cards could be used for recognition should not be controlling in light of the clearly misleading nature of Rinehart's solicitation.

Floyd Rinehart

Rinehart was one of the two key solicitors assigned to solicit authorization cards from the other employees. The following findings of fact made by the Trial Examiner with respect to the circumstances under which Rinehart signed a card were adopted by the Board:

“Rinehart, who was one of the three employees who first met with Union Representative Schrader and who solicited other employees to sign authorization cards, asked Schrader at the first meeting whether these cards constitute an immediate application to the Guild as dues-paying members. He replied that they were not members at that moment, but that the cards indicate the employees are interested in the Guild and that they want an election; that if the election is successful for the Guild, then the employees who signed would be members.”
(R. 80)

It is apparent from the foregoing that Schrader intended to give the impression that the cards would be used solely for an election. This is further demonstrated by the following question and answer by Rinehart:

“Q Did Mr. Schrader say at this meeting that one of the purposes of signing the card was to have the Guild as a collective bargaining representative without an election?

“A I don’t recall that, no.” (Tr. p. 698, lines 18-21)

It is submitted that the great emphasis placed on an election by Schrader without mentioning any other purpose is sufficient to invalidate the card of Rinehart.

The foregoing clearly demonstrates that the cards of Gray, Baylor and Rinehart should be rejected by the

Court under the standard approved by most of the courts of appeals. As the Guild represented far less than a majority of the editorial employees in an appropriate unit, the bargaining order portions of the Board's order cannot be enforced.

D. The Appropriate Bargaining Unit Consisted of Twenty-Eight Employees

In his decision in the representation proceeding (31-RC-18), the Regional Director determined, contrary to the position of Respondent, that News Editor Johnson, City Editor Berman, and Assistant Editor Palmer were supervisors and were thus excluded from the appropriate editorial department unit. With the exclusion of these three individuals, the bargaining unit consisted of 25 employees. It is the position of Respondent that the Regional Director's exclusions were erroneous and that therefore the appropriate bargaining unit consisted of 28 individuals. As even the Board found that the Guild obtained only 14 valid authorization cards, it is obvious that if the latter unit is correct, the Guild never obtained majority status. In addition, the inclusion in the unit of one of the three excluded individuals and rejection of only one of 14 cards will also demonstrate a lack of majority status.

In reviewing Board determinations as to supervisory status, the standard which should be applied is whether the Board's findings are supported by substantial evidence. *NLRB v. Security Guard Service, Inc.*, 384 F.2d 143 (5th Cir. 1967). Applying this test to the status of Johnson and Berman, this Court should conclude that the finding that Johnson and Berman were supervisors is not supported by substantial evidence. However, it is submitted that under no circumstances can the finding that Palmer was a supervisor be justified on the basis of the substantial evidence test.

Section 2 (11) of the Act sets forth the following detailed and specific definition of "supervisor":

"The term 'supervisor' means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances or, effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The legislative history behind this provision clearly indicates Congressional concern that employees with minor supervisory duties not be excluded from the protections afforded by the Act. This history reveals that the Senate bill with a narrower definition of "supervisor" was ultimately adopted. The intent behind this definition is indicated in the following excerpt from the Senate Committee Report:

"The committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in the act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as to the right to hire or fire, discipline, or make effective recommendations with respect to such action." (S.Rep. No. 105, 80th Cong. 1st Sess. 4 (1947))

The courts have considered this Congressional intent in construing Section 2 (11) and where employees exercise only minor supervisory duties which do not require the

exercise of substantial independent judgment, they have not been found to be supervisors. *NLRB v. Security Guard Service, Inc.*, 384 F.2d 143 (5th Cir. 1967); *Plastic Workers Union, Local 18 v. NLRB*, 369 F.2d 226 (7th Cir. 1966); *Tele-Trip Company v. NLRB*, 340 F.2d 575 (4th Cir. 1965); *NLRB v. Newton Company*, 236 F.2d 438 (5th Cir. 1956); *NLRB v. Parma Water Lifter Company*, 211 F.2d 258 (9th Cir. 1954).

In his decision, the Regional Director gave the following reasons for holding that Palmer was a supervisor: the exercise of authority to assign stories, to reprimand reporters and the use of his own discretion in determining preferences for publishing material. (GC Exh. 1 (d).) The record in both the representation case hearing and the unfair labor practice hearing renders it apparent, however, that Palmer had no authority over reporters and that, therefore, there was no basis for the Regional Director's finding that he exercised the authority to assign stories and reprimand reporters. (RC Tr. pp. 56-57; Tr. pp. 946, 1004.) Palmer's functions at the news desk are comparable to those of wire editor Cole, Sunday editor Ceder and night editor Baylor, all of whom received more compensation than Palmer. (RC Tr. pp. 52-58, 81-83.)

The evidence offered by employee witnesses does not support the contention of the Guild that Palmer is a supervisor. Baylor testified that during the six weeks between Palmer's appointment to the newly created position of assistant news editor and the hearing Palmer had reprimanded Baylor with respect to a sloppy work area by memos to the effect — "shape up, or else." (RC Tr. p. 312.) There is no evidence in the record that Palmer had the authority to issue such warnings. (RC Tr. p. 144.) In any event the imposition of such minor disci-

pline is not indicative of supervisory authority. *Crumley Hotel, Inc.*, 134 NLRB 113, 117 (1961); *West Virginia Pulp and Paper Company*, 122 NLRB 738 (1958). Baylor also testified that Palmer determined preferences for publishing material but it is apparent that despite Baylor's effort to exaggerate Palmer's authority in view of his disappointment over Palmer's receiving the title of assistant news editor, Palmer's authority to screen controversial material and other duties was comparable to those of Baylor, Cole and Ceder. (RC Tr. pp. 47-58, 400-403; Tr. p. 1005.) Geittmann indicated that she sometimes lobbies her stories with Palmer but conceded that this was when he was in the slot and she would lobby her stories with whoever was in the slot at a particular time. (RC Tr. pp. 282, 297.)

Reviewing the foregoing facts with earlier Board decisions involving supervisory status in the newspaper industry, it is apparent that the Regional Director's decision did not follow earlier Board decisions. The direction and assignment of work performed by Palmer have been consistently regarded as routine and employees performing such functions have been included in editorial department units. *Dow Jones & Company, Inc.*, 142 NLRB 421 (1963); *The Peoria Journal-Star, Inc.*, 117 NLRB 708 (1957); *Greensboro News Company, Inc.*, 85 NLRB 54 (1949).

Although there may be a stronger argument to support the contention that Johnson and Berman are supervisors, the record in the representation case and the unfair labor practice case demonstrate that although these employees engage in routine direction and coordination of work, they do not possess the genuine prerogatives of a supervisor. Neither Johnson nor Palmer have the authority to discharge, hire, adjust grievances, promote

or recommend wage increases. In fact, the only persons in the editorial department with knowledge of the salaries of the other employees in that department are executive editor Stewart and managing editor Moon. (RC Tr. p. 44.) The only basis, therefore, on which Johnson or Berman could be regarded as supervisors is due to their assignment or direction of work of others.

Johnson's assignment or direction of work is limited to the news desk employees and primarily to times when Johnson was functioning as "slot man" during the two or three hours each day when the principal edition of the newspaper is prepared at the news desk. (Tr. p. 947) Four other news desk employees also regularly function as slot man. (Tr. p. 1103)

Berman's role as city editor is primarily to coordinate assignments of reporters. Reporters are permanently assigned by Moon to permanent geographical and subject beats. (RC Tr. pp. 12, 13, 65, 201, 202) Assignments by the city editor are made on the basis of permanent assignments unless the permanent reporter is not available, in which case the assignment is made on availability with Moon being consulted in the event any question arises as to availability. Moreover, Berman receives \$10 per week less than one of the employees he allegedly supervises. (RC Tr. pp. 81-82)

Accordingly, the Court should find that the appropriate unit consists of 28 employees and that the Guild was not authorized as collective bargaining agent as of April 26, 1965 or any subsequent date.

The Board, however, contends that this Court is precluded from reviewing the determination of the Regional Director as to the supervisory status of Johnson, Berman, and Palmer. In the unfair labor practice proceedings, Respondent did attempt to prove that these

individuals were not supervisors. The Trial Examiner, however, with the approval of the Board, refused to permit such relitigation on the grounds that a party may not relitigate in an unfair labor practice proceeding what was or could have been litigated in a prior representation proceeding. In so doing, he relied on Section 102.67(f) of the Board's Rules and Regulations, which provides in part as follows:

“ . . . Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.”

Respondent contended and still contends that this provision is to be applied only in a related unfair labor practice proceeding where an employer is attempting to seek judicial review of a certification by refusing to bargain with the certified union. In such a case, the employer deliberately commits a technical unfair labor practice simply as a means of obtaining judicial review of an otherwise unreviewable representation proceeding. The employer in that situation is obviously concerned about judicial review, not review by the Board, and it is thus a waste of administrative effort for the Board to decide the same issues again in the unfair labor practice proceeding. In such a context, precluding relitigation is sensible. Outside this narrow exception, the charged party should in all fairness be entitled to a Board ruling or redetermination on a bargaining unit question such as supervisory status, which arises in the context of an unfair labor practice proceeding and which is crucial to the

resolution of the unfair labor practice question. See *Heights Funeral Home, Inc. v. NLRB*, 385 F.2d 879 (5th Cir. 1967); *Amalgamated Clothing Workers of America v. NLRB*, 365 F.2d 898 (D.C. Cir. 1966).

The Board in its brief nevertheless contends that Section 102.67 applies to other types of unfair labor practice proceedings such as the one in the instant case. The Board's sole rationale for this conclusion, as stated on page 26 of its brief, is as follows:

“ . . . However, since the issue has already been litigated in the representation case, and since the Board's bargaining order is based in part upon the resolution of this issue, making that determination reviewable in the court of appeals (Section 9(d)), there is no reason to allow the same issue to be litigated again, on the same evidence for the same purpose.”

In short, the Board's rationale is premised on the *availability of judicial review*.

After concluding that the Respondent could not relitigate supervisory status in the unfair labor practice proceeding before the Board because of the availability of subsequent judicial review, the Board then makes the bold-faced argument in its brief that Respondent is precluded from seeking judicial review in the instant case. The two contentions are obviously inconsistent and the Board cannot prevail on both. Either Respondent is entitled to relitigate supervisory status before the Board, or if not, it is entitled to judicial review.

Even aside from this inconsistency, the Board's arguments for precluding judicial review are clearly without merit. The Board's brief states that Section 10(e) of the Act precludes review. This Section provides in part as follows:

“... No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”

In the instant case, Respondent *did* attempt to raise its objections as to supervisory status before the Board in the unfair labor practice proceedings but the Board refused to entertain such objections. Certainly, the Board may not refuse to consider an issue and then accuse Respondent of not raising it.

The Board is forced to fall back on the argument that Respondent is precluded from seeking judicial review because of its failure to request review of the Regional Director's final decision in the earlier representation proceedings. Here, again, the Board's reasoning is totally inconsistent. On the one hand, the Board argues that Respondent refused to recognize the Guild in order to gain time to dissipate the alleged majority, and on the other hand, the Board argues that the Respondent should have filed a request for review thus delaying the date of the election. The Board's argument also fails to recognize that employers may forego time-consuming review procedures in order to avoid such election delays. In light of the general time lag between the filing of an election petition and the holding of an election and the Board's repeated concern over such a time lag, it is submitted that failure to seek such review is often commendable. Such an employer should not, however, be thereafter penalized and precluded from judicial review when such representation issues become crucial issues in a subsequent unfair labor practice proceeding.

In considering the failure to request review, it is also essential to note the power of the Board's regional directors in representation cases. Under Section 3(b) of

the Act, as amended in 1959, the Board was authorized to delegate to its regional directors its powers under Section 9 to decide representation cases. Section 3(b) provides in part as follows:

“The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such review will not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.”

Pursuant to this Section, the Board has delegated its powers in representation cases to the regional directors, except where the parties have mutually agreed to enter into a “stipulation for certification upon consent election.” In the latter case, the regional directors makes only a recommended decision and the final decision is made by the Board. In all other cases, including a “directed election” as occurred in the instant case, the regional director makes the final decision.

Section 3(b) does provide for a type of discretionary review of such final decisions. However, the review is not automatic and is granted by the Board only in a very limited number of cases. The failure to utilize such a discretionary and seldom granted review of a final representation decision should not preclude judicial review of a crucial issue in a subsequent unfair labor practice

proceeding. In the instant case, the decisions cited by the Board do not involve failures to file requests for review but rather involve failure to appeal decisions which were *not* final and for which a *de novo* appeal to the Board existed. Thus, in *NLRB v. Rexall Chemical Co.*, 370 F.2d 363 (1st Cir. 1967), the employer failed to appeal the regional director's recommendations in a "stipulation for certification upon consent election." In the other cited cases, the respondent failed to appeal the non-final trial examiner's decision in an unfair labor practice proceeding.

Lastly, it should be noted that the novel contention advanced by the Board is inconsistent with its own rules. In Section 102.67(f) previously quoted, the Board provides that failure to request review shall preclude relitigation in related subsequent unfair labor practice proceedings, and then in the very next sentence of the Section, the Board provides that denial of a request for review will have exactly the same effect. In short, under the Board's own rules, the result would be the same even if Respondent had requested review in the representation proceeding. In light of these provisions, it is submitted that the litigant is not given sufficient notice that the failure to seek review would have the grave consequences urged by the Board in the instant case.

In conclusion, it can be seen that Johnson, Berman, and Palmer should be included in the appropriate bargaining unit and that the Guild did not represent a majority in such appropriate unit. Respondent furthermore is not precluded from seeking judicial review of such a unit question. Respondent was apparently precluded from relitigating the question of supervisory status before the Board on the rationale that judicial review was subsequently available, and it is submitted that Respondent therefore should now have the right to such judi-

cial review. The Board's rules cannot be used as a justification for refusing review as it is clear that the effect of filing or not filing a request for review is exactly the same. Lastly, the Regional Director had the power, delegated by the Board, to make and did make a final unit decision and such final decision is reviewable by the Court in a subsequent unfair labor practice proceeding.

II. THE BOARD ERRED IN QUASHING THE SUBPOENA FOR THE PRODUCTION OF THE PRE-HEARING STATEMENTS WHICH WERE GIVEN TO THE GENERAL COUNSEL BY THOSE EMPLOYEES WHO SIGNED AUTHORIZATION CARDS AND WHICH RELATED TO THE CIRCUMSTANCES UNDER WHICH SUCH CARDS WERE SIGNED EVEN THOUGH SUCH EMPLOYEES WERE NOT CALLED AS WITNESSES BY THE GENERAL COUNSEL.

During the hearing Respondent served a subpoena duces tecum upon the General Counsel and his duly designated representatives Paul A. Cassady, Regional Director of Region 31, and Anthony F. Sauber, trial counsel, directing that they produce any statements in their possession relating to the circumstances surrounding the execution of nine authorization cards signed by employees of Respondent and introduced into evidence by the General Counsel. (Tr. Exam. Exh. 1.) Respondent's position was that since these authorization cards were being relied upon as evidence of the Guild's majority status, Respondent was entitled to examine any statements obtained by the Board relating to the circumstances under which such cards were executed for the purpose of determining the validity of the cards.

The Trial Examiner granted the General Counsel's motion to quash on the grounds that two requirements of

Section 102.118 of the Board's Rules and Regulations had not been met: the consent of the General Counsel to the production of the records had not been obtained (Tr. Exam. Exh. 3) and the employees whose statements were sought had not been called as witnesses by the General Counsel. It is submitted that this ruling was incorrect in that it contravened the rules of law relating to the production of statements during federal administrative hearings.

First, it should be noted that the Trial Examiner based his decision entirely upon Section 102.118 without questioning the relevancy or admissibility in other respects of the statements sought by Respondent. The law in this Circuit, as established in *General Engineering Inc. v. NLRB*, 341 F.2d 367 (9th Cir. 1965), is that documents in the possession of the Board cannot be withheld solely on the basis of Section 102.118 but rather the refusal to produce such documents must be based upon a recognized rule of evidence. As the Trial Examiner made no attempt to base his ruling on grounds other than Section 102.118, it is clear that his ruling was erroneous.

Secondly, the *Jencks* rule provides that in all public proceedings undertaken on behalf of the Government to enforce a public act, the Government may not rely upon a witness's testimony and then deny the Respondent access to statements of the witness which may impeach that testimony. *Jencks v. United States*, 353 U.S. 657 (1957). In the instant case the introduction of the authorization cards to prove majority status was tantamount to the signers of the cards testifying in person. Respondent therefore should have been permitted, under the *Jencks* rule, to examine the statements in the Board's possession relating to the circumstances under which the cards were executed. Indeed, the Ninth Circuit has held that the Board cannot impose its own limitations on the

Jencks doctrine and to the extent the limitations contained in Section 102.118 contravene the doctrine, they must be disregarded. *Harvey Aluminum v. NLRB*, 335 F.2d 749 (9th Cir. 1964). Therefore, to the extent that Section 102.118 is being applied in this case to prevent production of statements because the General Counsel's consent has not been obtained and the employees involved have not been physically called to testify by the General Counsel, it must be disregarded because under the *Jencks* rule the cards are the equivalent of oral testimony and the consent of the General Counsel is not required.

The Court should also be mindful that the refusal to allow examination of such statements could render it impossible for a respondent in cases of this type to fully obtain the facts relating to the execution of authorization cards. For example, the Board could administratively determine that certain misleading statements were not sufficient to invalidate the card and then introduce the card without producing the signer as a witness. Under the General Counsel's theory, neither the respondent nor the trier of fact would have the opportunity to consider a statement which might cast serious doubt on the validity of the card.

The Trial Examiner's suggestion that Respondent could call the employees as witnesses is clearly insufficient. If Respondent did call such employees as witnesses, it would not by that fact be entitled to their prior statements. Moreover, it might be impractical for the Respondent to call employees who have left the Los Angeles area. Finally, when Respondent does call witnesses who have given prior statements, the General Counsel argues, as he has done here, that their testimony is nine months old, influenced by threats, and should be disregarded. While thus attacking the credibility of the employees

and referring to a "morass of hazy. . . recollections," he continues to withhold statements in his possession given shortly after the election.

On the basis of the foregoing, it is submitted that if this Court determines the findings in this case support the Board's conclusion that the Guild was designated as bargaining representative by a majority of Respondent's editorial employees, then at the very least the case should be remanded to the Board with instructions that the order granting the motion to quash the subpoena duces tecum be vacated, the hearing reopened, and any statements by Butkus, Rinehart, Ceder, Baylor, Cole, Saenz, Gray, Erickson or Morrow relating to the execution of the cards be submitted to Respondent for review.

III. THE BOARD ERRED IN PERMITTING THE INTRODUCTION INTO EVIDENCE OF GENERAL COUNSEL'S EXHIBIT NO. 18 WHICH WAS OBTAINED BY THEFT.

General Counsel's Exhibit No. 18 is a private memorandum prepared by employee Johnson for publisher Curry. Employee Gillis stole a copy of this memorandum from city editor Berman's desk drawer, copied it, and delivered the copy to Loel Schrader, international representative for the Guild. Schrader in turn delivered the document to the General Counsel, who then offered it in evidence. (Tr. pp. 93-95.)

That Exhibit No. 18 was critical in the Trial Examiner's findings of fact is clearly evident from his decision. He specifically relied on the memorandum in finding the following violations: (1) the alleged "slip of paper" promise to Hall (R. 71, lines 52-65); (2) all other violations alleged against Johnson (R. 72, lines 59-62, 64-65); (3) that the alleged statements by Wahlheim and Curry

constituted a threat that working rules would be administered heartlessly and vindictively (R. 76, lines 33-37); and (4) that the wage increase effective June 28 and July 1, 1965, violated the Act (R. 84, lines 19-29). Moreover, the Trial Examiner obviously considered this evidence in resolving all of the credibility issues against Respondent's witnesses in connection with the Section 8(a)(1) allegations. These uses of the evidence demonstrate its critical importance in the Trial Examiner's findings and the Board's decision; the information in the memorandum is not, as Petitioner suggests, "merely cumulative." (Brief for Petitioner, p. 21, n. 15.)

Gillis admitted that he had taken the memorandum from Berman's desk without permission. (Tr. p. 93.) According to Schrader, the Guild's international representative, Gillis had been one of the union's representatives during the course of the election campaign period. (Tr. p. 50.) The Trial Examiner found that Gillis and another employee had been key solicitors of authorization cards on behalf of the Guild. (R. 68, lines 59-60.) It is clear, therefore, that in stealing the memorandum Gillis acted as the Guild's agent.

Respondent contends that the memorandum should have been excluded for two reasons. First, admission of this evidence conflicts with announced policies of the Act. Second, the Johnson-Curry memorandum was obtained in violation of the Fourth Amendment. These contentions will now be considered.

A. Admitting Evidence Illegally Obtained by a Labor Union Subverts National Labor Policy, and an Order Based Upon Such Evidence Should Therefore Not Be Enforced.

In the preambles to the Act, Congress stated its reasons for enacting this legislation. Section 1(b) of the Act contains this statement of policy:

“Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another’s legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.” (29 U.S.C. §141 (1964).)

This and other provisions of the preamble demonstrate that industrial peace was Congress’ main object. The statutes removed labor disputes from the streets and created a fair, peaceful method of settling them. For this method to work, however, Congress recognized that “employers, employees, and labor organizations [must] each recognize under law one another’s legitimate rights in their relations with each other.” If either party is permitted to ignore these rights, the system becomes unjust and peaceful methods break down.

Indispensable to any peaceful, just system of settling disputes is a rule that fair not foul means be used in preparation for the proceedings. A party to a labor proceeding has a legitimate right to expect that his opposition will employ only lawful devices in preparing its case. And if this right is to have value, the Board and the courts must protect it. Respondent submits that to implement this right and to discourage its violation, this Court should hold that evidence obtained illegally by either party to a labor dispute is inadmissible in Board proceedings.

It is easy to foresee the consequences of condoning the use of illegally obtained evidence in Board proceedings as proof of unfair labor practices. Employers victimized

by unlawful searches may feel that they too can obtain evidence of a union's unlawful activities by stealing it from union offices or by detaining and searching union members. The value of evidence to be obtained by these methods would in many cases make the risk worth taking. Moreover, a decision for Petitioner will embolden some unions to risk minor criminal penalties in order to obtain evidence damaging to an employer. One must realize that the stakes in labor disputes are often high and the desire for victory intense. Modern tools of industrial espionage — far more sophisticated than simple theft — are available to both sides. These consequences of a decision for Petitioner cannot be dismissed merely as the *reductio ad absurdum* of his arguments: To parties who are so often adversaries, the possibilities are real indeed.

The Board itself has recognized that using illegally obtained evidence in its proceedings conflicts with national labor policy. In *Hoosier-Cardinal Corporation*, 67 NLRB 49 (1946), the secretary-treasurer of a company union was secretly an active member of a labor organization that sought to become the bargaining representative. Through his office the secretary acquired the company union's records. A union organizer contacted the Board's regional office, advising its representative that the secretary would permit agents to see them. As a result a Board agent visited the secretary's home, made copies of the records and returned the originals to the secretary. Thereafter the Board subpoenaed officers of the company union to produce these documents. The employer objected to this evidence on the ground that it was obtained in contravention of the Fourth Amendment. Upon review, the Board refused to pass on the constitutional question, but decided unanimously to reject evidence obtained through these methods:

“Without passing upon the question, therefore, as to whether any constitutional rights were invaded, we have unanimously decided to overrule the Trial Examiner and reject the evidence obtained through the methods already described. Even where, as here, we do not question the integrity or motives of our agents, we prefer not to rely upon evidence obtained by such methods. It is better that there be a failure to take full advantage of such dubious opportunities than that Government, which ‘teaches the whole people by its example, * * * should play an ignoble part.’ As an administrative agency having both investigating and judicial duties, this Board must exact the highest standards of conduct from its investigating officers. Congress has vested this Board with authority to issue subpoenas, and has provided a means for enforcing them judicially when they are not complied with. It seems to us that, under these circumstances, the Board agents should have used the methods prescribed by the statute. . . .” (67 NLRB at 55.)

Thus without reaching the constitutional question, the Board in *Hoosier-Cardinal* decided that excluding unlawfully obtained evidence from its proceedings advanced the policies of industrial peace embodied in the Act.

The only distinction between this case and *Hoosier-Cardinal* is that the Board agent in *Hoosier-Cardinal* photographed the documents before he used them; in this case, the General Counsel simply introduced Gillis’s copy of the Johnson-Curry memorandum into evidence. This is a distinction without a difference. In *Hoosier-Cardinal*, Board agents neither initiated the acquisition of the evidence nor participated in the actual taking of the documents. The relevant involvement of the government was therefore as great as that admitted by Peti-

tioner in this case: The investigative arm of the Board was the beneficiary of an illegal seizure of documents by a union member.

Hoosier-Cardinal reflects the Board's own view of the relationship of illegally obtained evidence to the manifest policies of the Act. The opinions below in this case do not suggest that this view has changed: Although Respondent presented the question, the Trial Examiner and the Board did not consider it.

It is well settled that the Courts of Appeals should not enforce the Board's orders mechanically. The power of enforcement is equitable in nature, and this Court may consider whether the relief sought is inconsistent with principles of equity. *NLRB v. National Biscuit Co.*, 185 F.2d 123, 124 (3d Cir. 1950); *NLRB v. Eanet*, 179 F.2d 15, 20-21 (D.C. Cir. 1949). It is also clear that Section 10(e) grants courts of appeals discretion to consider whether enforcement of a Board order is consistent with the purposes of the Act. *NLRB v. Brown Lumber Co.*, 336 F.2d 641 (6th Cir. 1964); *NLRB v. Kingston Cake Co.*, 206 F.2d 604 (3d Cir. 1953); *NLRB v. Globe Automatic Sprinkler Co.*, 199 F.2d 64 (3d Cir. 1952). The Third Circuit has recognized that "... A court of appeals has some responsibility for the effects of its own decree; this is especially so where it appears that enforcement would entail subversion, rather than effectuation of the legislative purpose." *NLRB v. Kingston Cake Co.*, 206 F.2d 604, 611 (3d Cir. 1953) (Staley, J.). And as Professor Jaffe has stated, "A court should rarely be required — nor should it be thought that there is any intention to require it — to participate actively in the enforcement of a judgment which it finds offensive." Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 Harv. L. Rev. 865, 869 (1963).

Petitioner in this case seeks to enforce a Board order grounded in evidence obtained by a union member's theft. As has previously been demonstrated, this method of acquiring evidence subverts the national labor policies articulated by Congress. Respondent therefore requests this Court for that reason to exercise its equitable discretion and refuse to enforce the Board's order.

B. General Counsel's Exhibit No. 18 Was Obtained In Violation of the Fourth Amendment, and the Board Therefore Erred in Admitting This Document Into Evidence.

Burdeau v. McDowell, 256 U.S. 465 (1921), held that evidence illegally acquired by private individuals was admissible in federal court. Petitioner has cited this case as controlling authority for the admissibility of General Counsel's Exhibit No. 18. In the 47 years since the Supreme Court decided that case, however, the law of search and seizure has changed significantly. Subsequent cases have weakened its authority and shaken its foundations in constitutional policy. Its narrow holding is inapplicable to the facts of this case.

1. As a part of the "Silver Platter" Doctrine, *Burdeau v. McDowell* was overruled by implication in *Elkins v. United States*.

In 1914 the Supreme Court held in *Weeks v. United States*, 232 U.S. 383 (1914), that evidence acquired by federal agents in violation of the Fourth Amendment was inadmissible in federal court. However, the Court also stated that the Fourth Amendment was not directed at misconduct of state officials, 232 U.S. at 398, and that evidence obtained through an unreasonable search and seizure by state authorities without knowledge or cooperation of federal officers was admissible in a federal

court. Mr. Justice Frankfurter in *Lustig v. United States*, 338 U.S. 74, 79 (1949), dubbed this holding the "silver platter" doctrine.

The rule of *Burdeau v. McDowell* was a part of the silver platter doctrine. Though federal courts could not admit evidence acquired by federal officers in violation of the Fourth Amendment, evidence obtained by private individuals and presented to federal officers on a silver platter was admissible under the rule of *Burdeau v. McDowell*. In 1960 the Supreme Court overturned the silver platter doctrine, holding in *Elkins v. United States*, 364 U.S. 206 (1960), that federal courts could not admit evidence unconstitutionally obtained by state officials. When that case was decided, however, state courts were not obliged to exclude illegally obtained evidence. *Elkins* therefore required federal courts to suppress illegally obtained evidence even though the officers who seized it were themselves not the objects of the exclusionary rule. The Court reached this conclusion because the silver platter doctrine was inimical to the rights of privacy protected by the Fourth Amendment: It encouraged federal officers to use subterfuge to accomplish ends otherwise unlawful.

The silver platter doctrine of *Burdeau v. McDowell* is no less pernicious. If evidence obtained illegally by private individuals is admissible in federal proceedings, federal officers are encouraged to use artifice and manipulation to acquire proof of facts. These same infirmities accompanied the silver platter doctrine which the Supreme Court rejected expressly in *Elkins v. United States*. It is inescapable, therefore, that *Elkins* also overruled *Burdeau v. McDowell* by implication.

The Court of Appeals for the Sixth Circuit agrees with this conclusion. In *United States v. Williams*, 314

F.2d 795 (6th Cir. 1963), a district court had held certain evidence admissible. While appeal was pending the Supreme Court announced its decision in *Elkins v. United States*. The Sixth Circuit interpreted *Elkins* as a change in the rules of both *Weeks v. United States* and *Burdeau v. McDowell*, and because the district court had relied on both holdings the case was remanded. *Williams v. United States*, 282 F.2d 940 (6th Cir. 1960). According to the Sixth Circuit, therefore, *Elkins* weakened the bases of *Burdeau v. McDowell* in constitutional policy. Though other courts may have disagreed with this view, Respondent submits that the view of the Sixth Circuit is the correct interpretation of *Elkins*.

2. General Counsel's acceptance of the Johnson-Curry memorandum constitutes sufficient federal involvement in Gillis's theft for the exclusionary rule to be applied.

It is settled law that when a government official assists or induces illegal searches and seizures, federal courts must suppress evidence thus obtained. *Byars v. United States*, 273 U.S. 28 (1927). Active participation in the illegal search and seizure by federal officers is not necessary. In *Moody v. United States*, 163 A.2d 137 (D.C. Munic.Ct.App. 1960), a police officer learned that a theft victim had recognized his goods in defendant's apartment. The officer accompanied the victim to the apartment and waited in the hallway while the victim recovered his goods. The court held that the arresting officer had participated in the search even though his role was entirely passive. In *Gambino v. United States*, 275 U.S. 310 (1927), state troopers discovered liquor in defendant's automobile. Indicted in federal court for violation of the National Prohibition Act, defendant moved to suppress the evidence because the search had

been conducted in violation of the Fourth Amendment. At the time this case was decided, of course, the silver platter doctrine was accepted law. Although the Supreme Court found that the state troopers were not agents of the federal government, it held the evidence inadmissible because of the troopers' relation to the federal prosecution. Their purpose in searching the car was to aid the federal prosecution, and federal officials accepted and acted upon the aid. The Court said:

"The prosecution thereupon instituted by the federal authorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States." (275 U.S. at 316-317).

Respondent does not suggest that Board agents participated actively in Gillis's illegal seizure of the Johnson-Curry memorandum. But just as the federal authorities in *Gambino* ratified the illegal state arrest by instituting the prosecution, so the General Counsel ratified — and became implicated in — Gillis's theft by accepting and using the memorandum. Because of this federal involvement in the theft, the Board should have applied the exclusionary rule and suppressed General Counsel's Exhibit No. 18. There is no significant difference between cases where officials passively assist illegal activity, or become the beneficiaries of the illegal efforts of state police officers, and this case. Here, the General Counsel was the direct beneficiary of a theft committed by a Guild agent. The Constitutional guarantees of privacy and personal freedom require this Court to deny the prosecutorial arm of the Board the opportunity to profit by such action. As Justice Brandeis said, dissenting in *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921), "Respect for law will not be advanced by resort, in its enforce-

ment, to means which shock the common man's sense of decency and fair play."

That unfair labor practice hearings are quasi-civil in nature does not change this result. Because the Board may impose serious sanctions for violation of the provisions of the Act, its actions are similar to criminal proceedings. Nothing in the Fourth Amendment suggests that its provisions are limited to criminal cases, and the Supreme Court has never so held. See *Boyd v. United States*, 116 U.S. 616 (1886); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). In 1967 the Court held that warrantless searches by health officials, though civil not criminal in nature, violated the Fourth Amendment. *Camara v. Municipal Court*, 387 U.S. 523 (1967). The Fifth Circuit has stated flatly that the Board must apply the exclusionary rule:

"If the Board should base its findings solely upon evidence obtained by an unconstitutional search, the order resting thereon would be invalid, because such evidence is incompetent." (*NLRB v. Bell Oil & Gas Co.*, 98 F.2d 870, 871 (5th Cir. 1938).)

3. The Essential Policy of the Exclusionary Rule Is Served When Evidence Illegally Obtained By a Labor Union Is Excluded.

The Supreme Court enunciated the purpose of the exclusionary rule in *Elkins v. United States*:

"The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guarantee in the only effectively available way — by removing the incentive to disregard it." (364 U.S. 206, 217 (1960).)

Obviously, applying the exclusionary rule will not serve the purpose of deterrence if the person who commits the

illegal search is not deterrable. This Court should therefore consider whether a labor union is an entity likely to be deterred from conducting illegal searches and seizures by the exclusionary rule.

To this inquiry three factors are relevant. First, the effectiveness of the exclusionary rule depends on the searcher's awareness of the law. If persons committing or directing a search and seizure are unaware of the law governing their actions, it is futile to expect that they will be deterred by the exclusionary rule. Second, the rule's effectiveness depends on the searcher's desire that the items he obtains be used in administrative or judicial proceedings, for if he has no interest that they be introduced as evidence, the disposition of the case will not deter him in the future. Finally, this Court should consider the effectiveness of other remedies available to the victim of an illegal search and seizure. If other remedies adequately deter these activities, evidence obtained through illegal means might be deemed admissible. Respondent contends that an examination of these factors requires that evidence obtained illegally by labor unions in an election proceeding be excluded.

First, most matters concerning labor-management relations are subjected to judicial scrutiny, and unions are advised by competent legal counsel. One can therefore expect that labor unions are aware of the law governing their actions. This awareness can be transmitted easily to the membership. Instead of frustrating federal policy against unwarranted intrusions of privacy, labor unions can help enforce it by discouraging their members from using illegal means to obtain evidence for proceedings against their employers.

Second, labor unions engaged in election proceedings strongly desire that evidence they obtain be used in administrative proceedings to prove unfair labor prac-

tices. Thus it is important to them that their evidence be admissible before the Board, and the possibility that it would be excluded would deter unions from acquiring it illegally.

Finally, remedies other than the exclusionary rule are ineffective in preventing unions from employing unlawful means to obtain evidence. A criminal prosecution of union member Gillis, for example, would have little deterrent effect on the Guild itself. Knowing that if relevant evidence could be obtained through theft, a union might induce a member to risk minor criminal penalties in order to get it. By removing the incentive to obtain the evidence, this Court would provide an effective, practical remedy to victims of a criminal, unconstitutional breach of privacy. This same ineffectiveness of other remedies drove the California Supreme Court in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955), to adopt the exclusionary rule.

In conclusion, it is submitted that by admitting evidence illegally acquired by labor unions, the Board — and this Court — would “participate in, and in effect condone,” *Id.* at 445, 282 P.2d at 911-12, the lawless activities of union members. No remedy other than the exclusionary rule will stop it. But by requiring the Board to exclude such evidence, this Court will secure compliance with Fourth Amendment guarantees and raise Board practice to its rightful position as a constitutional, peaceful, and just method of settling labor disputes. Excluding evidence illegally obtained by labor unions from Board proceedings will rid the Board of the dirty business exemplified by the facts of this case. Respondent respectfully submits that this Court hold that General Counsel’s Exhibit No. 18 was obtained in violation of the Fourth Amendment and that the Board erred in admitting it into evidence.

CONCLUSION

On the basis of the foregoing, enforcement of the bargaining order portion of the Board's order against Respondent should be denied and with respect to the other portions of the order the proceeding should be remanded to the Board for a new hearing.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with these rules.

PETER M. ANDERSON

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SOUTH BAY DAILY BREEZE, A DIVISION OF
SOUTHERN CALIFORNIA ASSOCIATED NEWSPAPERS, INC.,
Respondent.

On Petition for Enforcement of an Order of
The National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

1. The Company's extended comment on the unreliability of authorization cards misses the mark.¹ The Board has never asserted that cards are the most reliable indicators of majority status. In fact, when a union claims

¹ It is true, as the Company states, that the Fourth Circuit in *N.L.R.B. v. S. S. Logan Packing Co.*, 386 F.2d 562, indicated disapproval of bargaining orders on the basis of a card majority. But the Fourth Circuit has reconsidered this position and has, subsequent to *Logan*, upheld bargaining orders based on a card majority. *N.L.R.B. v. Sehon Stevenson & Co.*, 386 F.2d 551; *N.L.R.B. v. Preiser Scientific, Inc.*, 387 F.2d 143; *N.L.R.B. v. Lifetime Door Co.*, 67 LRRM 2704.

to represent a majority of the employees on the basis of signed authorization cards an employer who has a good faith doubt of that claim ordinarily is privileged to insist that a union verify its claim by winning a Board election.² But it is not privileged to insist upon an election and, at the same time, commit unfair labor practices which render impossible the holding of a free and fair election. In this case the employer engaged in flagrant and pervasive economic coercion, including threats that Guild supporters would not be considered for managerial positions and would be black-balled from the entire newspaper industry. Such conduct, we submit, makes a sham of the electoral process. In such circumstances, the authorization cards, rather than an election, become the best evidence of majority status; it is not for the employer to complain about the use of cards when his own actions have made their use necessary.

As outlined in the Company's brief, some courts of appeals have recently adopted a somewhat different standard than the Board's *Cumberland Shoe* doctrine (see 351 F.2d 917 (C.A.6)). Thus in *N.L.R.B. v. S. E. Nichols*, 380 F.2d 438 (C.A. 2), the Court stated that it would not look to see if the word *only* was used but rather whether "the signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election." In this case the Trial Examiner, relying on *Cumberland Shoe*, referred only to testimony required under that doctrine. We submit, however, that the cards here can be sustained under the *Nichols* standard as well. The portions of the record relevant to this standard are referred to at pp. 34-38 of our main brief. That testimony shows that in no case did an employee sign a card in reliance upon a representation that the Guild could not be recognized without an election. Rinehart, Peterson³ and

² See *Aaron Brothers*, 158 NLRB 1077, 1078-1080; *Textile Workers Union (Hercules Packing Corp.) v. N.L.R.B.*, 386 F.2d 790 (C.A. 2).

³ The Company objected to Peterson's card before the Board but does not pursue its objection here.

Gray clearly indicated that they understood that the Guild could be recognized without an election.⁴ The testimony of Baylor and Erickson is somewhat ambiguous and does not make out a case of clear misrepresentation as to the purpose of the card.⁵ Only in the case of Cole was there evidence that he was led to believe that the Guild would not be recognized without an election. There was other evidence, however, that Cole signed the card because he wanted the Guild to represent him and was not induced to sign because of the misrepresentation. Most notable is his admission that he actively campaigned on behalf of the Guild in early stages of the election campaign shortly after he signed the card.

2. There is nothing inconsistent, as the Company suggests, in the Board's contentions that the Company can neither relitigate nor obtain judicial review of the Regional Director's finding as to the makeup of the unit. The Company's contention is based upon its refusal to acknowledge that two entirely separate issues are presented. First is the issue of relitigation which is controlled by Section 102.67(f) of the Board's Rules and Regulations which states that "... Failure to request review [or denial of a request for review] shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding." As shown in our main brief, pp. 24-26, the representation and unfair labor practice proceedings were related within the meaning of the rule. The cases cited by the

⁴ Rinehart's activities on behalf of the Guild belie the Company's implication that he did not intend to have the Guild represent him and only signed the card because he wanted an election.

⁵ In evaluating such testimony, it is important to take into account the considerations mentioned recently by the District of Columbia Circuit in *United Automobile Workers (Preston Products Co.) v. N.L.R.B.*, 66 LRRM 2548, 2552 (see p. 33 of our main brief) and also the fact that the employees here were college educated newspaper reporters who read and signed a clear and unambiguous authorization card.

Company⁶ are readily distinguishable (See our main brief, p. 26, n. 26). In both cases the issue sought to be relitigated, (supervisory status) was raised for an entirely different purpose in the unfair labor practice case than in the representation case. Here, the Company sought to introduce the same evidence in order to litigate the same issue for the same purpose. As we show in our main brief (pp. 24-26), there is no reason in law or policy to impose this wasteful procedure on the litigants and the Board.

The next question, which is a separate and independent one, is whether the Regional Director's determination in the representation case is judicially reviewable. Under normal circumstances such a decision would be reviewable. But here the Company chose not to seek review of the Regional Director's determination. Instead, it expressly waived its right to appeal to the Board. Because of this, the election was held according to the terms of the Regional Director's decision. We submit that it is too late at this stage of the proceedings to seek review of that decision. (See our main brief, pp. 27-30.)

3. The Company seeks pre-hearing statements of employees who were not called to testify by the General Counsel. Although relying on the *Jencks* rule, the Company does not refer to any portion of the relevant statute which supports its position; nor are any cases cited in support of this novel contention. Indeed, the relevant section of the Jencks Act itself (which of course is not, technically speaking, applicable to Board proceedings), makes it perfectly clear that there is no merit to the Company's contention:

In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent

⁶ *Heights Funeral Home, Inc. v. N.L.R.B.*, 385 F.2d 879 (C.A. 5); *Amalgamated Clothing Workers of America v. N.L.R.B.*, 365 F.2d 898 (C.A.D.C.).

of the Government shall be the subject of subpoena, discovery or inspection *until said witness has testified on direct examination* in the trial of the case.

18 U.S.C. 3500(a). (emphasis supplied.)

The Company seeks to avoid the clear wording of the statute by the unsupported assertion that the introduction of authorization cards is tantamount to having the signer testify. This kind of contention has been rejected wherever it has been raised. *United States v. Gordon*, 158 F. Supp. 207, 209 (N.D. Ill.); *United States v. Neverline*, 266 F.2d 180 (C.A. 3).

Nor is there any merit to the Company's assertion that it was impossible fully to obtain the facts. The Company could have taken pre-hearing statements from any of the employees if it had wished and it was free to call the employees to testify at the hearing. Indeed, it did call eight of the nine employees whose statements it is seeking and obtained their testimony under oath. The contention that it was entitled to more than this is, we submit, without substance.

4. The Company seeks to exclude a document, General Counsel's Exhibit No. 18, which an employee, Gillis, took from the desk drawer of City Editor Berman. Gillis had a copy made of the document and gave the copy to Schrader, international representative for the Guild, who later turned it over to the General Counsel. There is no evidence that the General Counsel, or Schrader, had any part in the taking of the document or even knew how it had been obtained.

It has long been the general policy of the Board, with respect to allegedly stolen documents, to conform its practice to federal law. *Andrew Jergens Co.*, 27 NLRB 521; *Air Line Pilots Association*, 97 NLRB 929; *General Engineering, Inc.*, 123 NLRB 586.⁷ It is a well-settled principle of

⁷ *Hoosier-Cardinal Corporation*, 67 NLRB 49, relied on by the Company is not to the contrary because there the Board agents were intimately involved in the illegal activities.

federal law that the Fourth Amendment protects against unreasonable seizures by *governmental* agents and does not affect the actions of private parties. *Burdeau v. McDowell*, 256 U.S. 465; *Evalt v. United States*, 359 F.2d 534, 542 (C.A. 9). Every case cited by the Company included either federal or state involvement in the seizure and are thus not applicable to the present situation. The decision in *Elkins v. United States*, 364 U.S. 206, extending the protection of the Fourth Amendment to cover the activities of state governmental agents, is no authority for the Company's contention that *Burdeau* has been overruled. Indeed, *Burdeau* was not even cited in the *Elkins* opinion. Moreover, there are numerous decisions after *Elkins* in which the rule of *Burdeau* has been followed or approved. *United States v. McGuire*, 381 F.2d 306, 313 n. 5 and cases cited therein (C.A. 2).⁸ The Company's reliance on *United States v. Williams*, 282 F.2d 940 (C.A. 6) is misplaced, for in that case the search was carried out by *governmental agents*. Thus, *Williams* has no relevance to *Burdeau* or to this case. In sum, the Company is left with no case which applies the Fourth Amendment to the action of purely private parties.

The Company's contention (Br. 54-56) that application of the exclusionary rule here will serve the purpose of deterrence is based on the assumption that the Union was in some way connected with the seizure. There is no evidence to support this assumption. The mere fact that Gillis solicited authorization cards for two days can hardly raise him to the level of the Guild's general agent. Moreover, there is no basis for the Company's apparent belief that the Guild, absent strong deterrent measures, would not hesitate to engage in widespread illegal searches and seizures.

In any event the introduction of exhibit No. 18 was not prejudicial. The Company points out (Br. 44-55) that on four occasions the Trial Examiner referred to the exhibit when he found a violation. But when the Trial Examiner's

⁸ Accord, *United States v. Goldberg*, 330 F.2d 30 (C.A. 3). Cf. *Barnes v. United States*, 373 F.2d 517 (C.A. 5); *Corngold v. United States*, 367 F.2d 1, 4 (C.A. 9); *Evalt v. United States*, 359 F.2d 534, 542 (C.A. 9).

decision is closely analyzed it becomes apparent that, in each instance, the exhibit was just one of many factors that the Trial Examiner relied on and was merely corroborative of other substantial evidence. Moreover, there were literally a score of other Section 8(a) (1) violations, including extremely coercive economic threats and promises, which were in no way related to or dependent upon exhibit No. 18. Thus, since the exhibit was merely corroborative where referred to and in no way connected with the majority of the violations, it can hardly be considered prejudicial.

CONCLUSION

For the foregoing reasons and for the reasons stated in our opening brief we submit the Board's order should be enforced in full.

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Attorneys,
National Labor Relations Board.

May 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN W. GARDNER, Secretary of Health,
Education and Welfare,

Appellant

v.

PAUL E. SLOANE and ALYSE S. SLOANE,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF AND APPENDIX FOR THE APPELLANT

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FILED

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IN THE UNITED STATES COURT OF APPEALS
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No. 21950

JOHN W. GARDNER, Secretary of Health,
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Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF AND APPENDIX FOR THE APPELLANT

JURISDICTIONAL STATEMENT

This action was brought by the claimants-appellees in the court below, pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), to obtain judicial review of a final decision of the Secretary of Health, Education and Welfare (R. 1-3).^{1/} The Secretary had held that deductions should be imposed against old-age social security retirement benefits due the claimant and his wife during the years 1958 through 1960, and

^{1/} The designation "R." refers to the portion of the Record reproduced by the Clerk of this Court. The designation "Tr." refers to the transcript of the administrative proceedings, four copies of which have been filed with the Clerk.

for the first six months of 1962 before the wage earner celebrated his seventy-second birthday because the wage earner, a self-employed attorney, had earnings in excess of the amount allowed by the statute (Tr. 14-18).

The district court upheld the Secretary's decision with respect to the years 1958 through 1960 but reversed the decision of the Secretary for the year 1962, holding that the Secretary had misinterpreted the applicable law in taking into account income received by the claimant during the entire calendar year in which he reached 72, rather than just the six months prior to his seventy-second birthday (R. 21-27). Accordingly, the court entered summary judgment on May 12, 1967, affirming the decision of the Secretary, but modifying that part requiring the plaintiffs-appellees' repayment of \$999.00 in benefits received for the first six months of 1962 (R. 28-29). On May 15, 1967, the Secretary filed notice of appeal limited to the adverse part of the district court order, i.e., the year 1962 (R. 30-31). The jurisdiction of this court is based upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

1. The Statutory Background.

Under the Social Security Act an individual is entitled to old-age insurance (retirement) benefits if he is fully insured, has attained the age of 65, and has filed application for benefits (42 U.S.C. 402(a)), (App. 1a). However, if an

individual under 72 years of age continues to work and receives wages or self-employment income, his retirement benefits and those of his qualifying dependents are reduced, by deductions, depending upon the amount of his "excess earnings". (42 U.S.C. 403(b)) App. 1a). During 1962, the year in question, the Social Security Act provided for the reduction of insurance benefits and the charging of an individual's excess earnings "to the first month of such taxable year an amount of his excess earnings equal to the sum of the payments which he and all other persons are entitled for such month" on the basis of his income and the balance of such excess earnings shall be charged "to each succeeding month in such year" (42 U.S.C. 403(f)(1)) (App. 2a-3a). The statute then goes on to provide that "Notwithstanding the preceding provisions of this paragraph, no part of the excess earnings of an individual shall be charged to any month * * * B) in which such individual was age seventy-two or over * * * . Ibid.)

Specifically, 42 U.S.C. 403(f)(3) (App. 3a) in effect in 1962, provided that an individual's excess earnings for a taxable year shall be his earnings for such year in excess of the product of "\$100 multiplied by the number of months in such year." ^{2/} Thus if the claimant had earnings of \$1,200 or less during the year, he received the full amount of his Social Security benefits. If he had earnings of over \$1,200 but not over \$1,700 he lost \$1.00 in benefits during the months of the year before he reached 72 for each two dollars he earned. For all

^{2/} The 1965 Amendments to the Act raised the amount to \$125. 42 U.S.C. (Supp I) 403(f)(3).

earnings over \$1,700, he lost a dollar in benefits for each dollar he earned in that year.

The Act further provides that an individual will be presumed to have been engaged in self-employment in any such month unless it is shown to the satisfaction of the Secretary that he rendered no substantial services in that particular month with respect to any trade or business, the net income of which is included in computing his net earnings from self-employment for any taxable year (42 U.S.C. 403(f)(4)(A)) (App. 3a

The Act defines the term "taxable year" to "have the same meaning as when used in Chapter I of Title 26" [the Internal Revenue Code of 1954] (42 U.S.C. 411(e)) (App. 4a). It expressly provides that the "taxable year of any individual shall be a calendar year unless he has a different taxable year for the purposes of the [Internal Revenue Code] in which case his taxable year for the purposes of this subchapter shall be the same as his taxable year under [the Code]." And the Internal Revenue Code provides for returns for periods of less than 12 months only in cases where (1) the taxpayer has changed his annual accounting period; (2) the taxpayer is not in existence for the entire taxable year; or (3) when the Commissioner terminates the taxable year because the tax is in jeopardy under 26 U.S.C. 68 (26 U.S.C. 443) (App. 5a).

And the Act requires an individual entitled to benefits to report his earnings or wages for the taxable year to the Secretary before April 15 of the succeeding year. This report need not be made only for any taxable year "beginning with or

after the month in which such individual attains the age of 72" or if benefit payments for all months in which the individual is under 72 have been suspended (42 U.S.C. 43(h)(1)(A)) (App. 3a-4a).

2. The Relevant Facts.

The facts are essentially undisputed.

Paul Sloane retired from his employment as an attorney in the legal department of the Pacific Gas and Electric Company in September of 1955 after attaining the age of 65 in July 1955 (Tr. 16, 98, R. 21). He applied for old-age insurance benefits in May 1956 (Tr. 98-99), and benefits were paid to him through November 1962 (Tr. 150). Alyse Sloane, his wife, received benefits on the basis of his earnings record from June 1957 through November 1962 (Tr. 102-109).

In December 1962, the Social Security Administration, on the basis of information from the Internal Revenue Service, determined that there had been an overpayment and that the claimant and his wife had received benefits to which they were not entitled because Mr. Sloane was not retired but was self-employed. Accordingly, they discontinued further payments until the amount of the overpayment would be repaid (Tr. 146-47, F. 22).

The following facts were adduced at the administrative hearing; after retiring from the Pacific Gas and Electric Company in 1955 at the age of 65, Mr. Sloane opened a private law office and practiced law full time in San Francisco (Tr. 35-36).

Mr. Sloane worked the entire year 1962 -- the year in question -- handling numerous estates (Tr. 55-56). On July 8, 1962, he became 72. During the entire year 1962, he had a total income of \$36,365.79 with expenses of \$14,707.88, or a total self-employment income of \$21,657.90 (Tr. 224, 229). He explained that these fees were earned as a result of the settlement of various large estates (Tr. 229). Mr. Sloane testified that while he could have deferred receiving the great bulk of these fees until January 1963, he settled the estates in 1962 after his 72nd birthday because he "figured it would make no difference" when he received the fees as long as he was over 72 (Tr. 59-61).

3. Administrative Decision and Proceedings Below.

The Secretary, through the Hearing Examiner, found that the claimants-appellees' old-age benefits were subject to deductions for the years 1958 through 1960 and the first six months of 1962. The Hearing Examiner expressly noted the provisions of paragraph 1813 of the Social Security Handbook on old-age benefits:

Earnings for the entire year in which a person becomes entitled to benefits, he reaches the age 72, or his benefits are terminated are counted in figuring the annual earnings and this can cause loss of benefits under some conditions. (Tr. 64, 67).

The Hearing Examiner further pointed out to Mr. Sloane that "in determining whether the deductions are payable [imposed], the law says you must compute the earnings of the

entire year on an annual basis not on a month or day, but on the entire year." (Tr. 67).

The claimant and his wife then brought this action in the district court for review of the administrative decision (R. 1-3). On cross-motions for summary judgment, the district court upheld the Secretary's determination with respect to the years 1958-1960 but, with respect to the year 1962, (R. 21-24, 27) rejected the Secretary's argument that in determining the earnings attributable to an individual, the entire taxable year is to be used, rather than just the months prior to the wage earner's 72nd birthday. The court accordingly reversed the Secretary's decision requiring repayment of the money received in the six months of the year 1962 before the claimant reached his seventy-second birthday (R. 26).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Social Security Act, 42 U.S.C. 401 et seq., Internal Revenue Code, 26 U.S.C. 441 et seq. and Regulations of the Social Security Administration are set forth in the appendix to this brief, infra, pp. 1a - 5a .

SPECIFICATION OF ERRORS

1. The district court erred in holding that in determining whether a deduction for excess earnings is to be made from a wage earner's old-age insurance benefits for the year in which he reaches his seventy-second birthday, the Secretary may take into account only earnings in the months prior to the wage earner's seventy-second birthday, and not the earnings for the entire twelve months calendar year.

2. The district court erred in remanding the case to the Secretary for recomputation of the amount of overpayment.

SUMMARY OF ARGUMENT

1. The Social Security Act, 42 U.S.C. 411(e), expressly incorporates the definitions of taxable year contained in the Internal Revenue Code. And under the Internal Revenue Code, 26 U.S.C. 441(b)(3), 26 U.S.C. 443, the wage earner's taxable year was the twelve month calendar year. Thus, where as in the instant case, the wage earner performed services as a self-employed lawyer throughout the year and had a taxable income of \$21,657.90 for the entire year, the district court was plainly wrong in holding that the wage earner and his wife were entitled to their old-age benefits for the first six months of the year, before he became 72, even though the wage earner was admittedly performing services and deferred receiving his income until after his seventy-second birthday.

Contrary to the district court's characterization of the statute as "ambiguous", the statute and its legislative history makes it clear that in determining what earnings are to be considered for the purpose of imposing deductions, Congress intended the "taxable year" to consist of the entire 12 months period, and the wage earner is required to make an earnings report to the Secretary for the entire year when the wage earner turns 72. 42 U.S.C. 403(h)(1)(A).

2. Indeed, assuming arguendo that the statute were ambiguous, the district court erred in rejecting the Secretary's interpretation, where as pointed out by the district court "[I]t is possible to construe it as the Administration has." (R. 26). For as pointed out in Udall v. Tallman, 380 U.S. 1, 4, 16 where, as here, an administrative interpretation of a statute is plainly reasonable, the Secretary's interpretation should not be brushed aside by the courts.

ARGUMENT

Introduction

Paul Sloane, the wage earner in this case, had a taxable income in 1962 of \$21,657.90 (Tr. 224). Although he worked the entire year as a self-employed lawyer (Tr. 36), virtually all of this income was received during the second half of the year, specifically after he had turned 72 on July 8, 1962. The single question presented on this appeal is whether, in determining his old-age benefits, for the first six months of the year, his income during the second six months must be taken into account. If so, the wage earner was admittedly subject to "excess earnings" deductions from his benefits for the January - June period. If, however, the post-July 8 income receipts are irrelevant, then (in view of the fact that he received very little income prior to July 8) no excess earnings deductions would be chargeable against his benefits for the first half of the year.

IN IMPOSING DEDUCTIONS ON A SELF-EMPLOYED WAGE EARNER'S OLD-AGE INSURANCE BENEFITS BECAUSE OF EXCESSIVE EARNINGS IN THE YEAR WHEN THE CLAIMANT CELEBRATED HIS 72ND BIRTHDAY, THE SECRETARY CORRECTLY HELD THAT THE EARNINGS FOR THE TAXABLE YEAR WERE THE EARNINGS FOR THE ENTIRE TWELVE MONTH CALENDAR PERIOD AND NOT ONLY THE EARNINGS FOR THE MONTHS PRIOR TO HIS 72ND BIRTHDAY.

For purposes of the administration of the Social Security Act (and thus the imposition of deductions from a wage earner's benefits because of excess earnings in the taxable year), 42 U.S.C. 411(e) (App. 4a), expressly defines the term "taxable year" to have the "same meaning" as when used in the Internal Revenue Code and that "the taxable year of any individual shall be a calendar year" unless the individual has a different taxable year under the Internal Revenue Code. And under the Internal Revenue Code, 26 U.S.C. 441(b)(3), 26 U.S.C. 443, returns can be made for periods of less than twelve months only in specific enumerated circumstances not applicable to the case at bar.^{3/} Thus there is no question that, under the Internal Revenue Code, Mr. Sloane's taxable year was the entire twelve month calendar year of 1962, and was not to be limited to those months prior to his 72nd birthday.

^{3/} The Internal Revenue Code, 26 U.S.C. 443 provides that return can be made for periods of less than twelve months only in cases where (1) the taxpayer has changed his annual accounting period, (2) the taxpayer is not in existence for the entire taxable year, or (3) when the Commissioner terminates the taxable year for tax in jeopardy under 26 U.S.C. 6851. Admittedly, none of these conditions for establishing a shorter than twelve months taxable year under the Internal Revenue Code were met by Paul Sloane for the period here in question.

In line with these statutory requirements, the Social Security Administration's Handbook^{4/} notes:

§ 1813. Earnings for the entire year in which a person becomes entitled to benefits, he reaches age 72, or his benefits are terminated are counted in figuring the annual earnings and thus can cause loss of benefits under some conditions. Thus, if a worker had earned \$800 through April and became entitled to benefits of \$100 monthly in May, and then earned \$200 a month in each of the months of May through October, his total annual earnings are \$2,000 even though he earned only \$1,200 after becoming entitled to benefits. His excess earnings, computed in accordance with § 1804 above, are \$550, to be charged against his benefits for the year. Skipping January through April, because he was not yet entitled to any benefits for those months, no benefits will be payable for May through September; he will receive a partial benefit of \$50 for October. Full benefits can be paid for November and December, since no excess earnings remain to be charged against benefits for those months. * * *

There is no justifiable support for the district court's view that the Internal Revenue Code concept of taxable year was inapplicable to determinations of excess earnings under Section 403.

First as we pointed out, supra, for purposes of the administration of the Social Security Act (and thus the imposition of deductions from a wage earner's benefits because of excess earnings), 42 U.S.C. 411(e) expressly incorporates the definition

^{4/} Social Security Handbook on Old-Age, Survivors and Disability Insurance, 2nd Ed., January 1963.

of taxable year contained in the Internal Revenue Code,
26 U.S.C. 441(b)(3), 26 U.S.C. 443. Nothing in 42 U.S.C.
403 suggests that the Internal Revenue Code taxable year is
inapplicable in the imposition of deductions. To the contrary,
42 U.S.C. 403(h)(1)(A) (App. 3a - 4a) contains an affirmative
indication that Congress intended the taxable year concept to
apply to Section 403 determinations. That subsection expressly
provides that, where, as here, the wage earner turns 72 in
the middle of the year, the "taxable year" is the entire 12
month period and the wage earner is required to make an earnings
report to the Secretary for the entire year. It is only in the
taxable year "beginning with or after the month in which such
individual attained the age of 72" that no reports need be made.

Moreover, the Secretary's construction of this provision
is supported by the legislative history. Specifically, the
Senate and House Reports accompanying the 1950 Amendments to
the Social Security Act, which first extended coverage to self-
employed lawyers such as Mr. Sloane,^{5/} provided that "benefit"
deductions would be imposed for any month as a result of the self-
employment of a beneficiary "only when the beneficiary both had
substantial net earnings from self-employment in the year and
rendered substantial services in a trade or business in that
month." S.Rept. 1669, 81st Cong., 1st Sess., at p. 74 (App. 11a

5/ Senate Report No. 1669, 81st Cong., p. 6.

6/ For the convenience of the Court, the pertinent pages
of the Senate Reports are reproduced in the Appendix
to this brief.

Here Mr. Sloane admittedly practiced law full time during the first six months of 1962 (Tr. 36-37). That he allegedly had no earnings during a few of these months makes no difference. Thus, the Senate Committee report points out that "if an individual entitled to old-age insurance benefits engaged throughout the taxable year in business as a real-estate broker and earned more than [the allowable amount] for the entire year, he will suffer a deduction under section 203(b)(2) for each month of the year even though during several months of the year he may have operated at a loss through an inability to negotiate any sales in those months." Senate Rept. No. 1669, Ibid., at p. 74. And the legislative history shows further congressional awareness that even in the year when the claimant becomes entitled to benefits, or as here becomes free from statutory earnings restriction, "[g]enerally, the taxable year of an individual will be a calendar year, or a fiscal year, containing 12 months." S. Rept. 1669, Ibid., at p. 73 (App. 9a).

There is no doubt that, in view of the foregoing considerations, the Secretary was clearly justified in interpreting the statute to mean that "Earnings for the entire year in which a person * * * reaches age 72 * * * are counted in figuring the annual earnings and thus can cause loss of earnings under some conditions." Section 1813 of the Social Security Handbook, supra, p. 11. Indeed, as the district court itself recognized, "It is possible to construe [the law] as the Administration has" since this construction "is consistent" with the use of the income

tax returns to check the earnings of claimants during a taxable year" (R. 26). In these circumstances, where the district court itself recognized that the administrative interpretation was reasonable, the district court, we submit, should not have substituted its own interpretation for that of the administrator's. As pointed out in Udall v. Tallman, 380 U.S. 1, 4, 16 even where an administrative "interpretation may not be the only one permitted by the language of the order, but it is quite clearly a reasonable interpretation, courts may therefore respect it." 380 U.S. at 4.

CONCLUSION

For the foregoing reasons, we respectfully submit that that part of the district court judgment adverse to the Secretary should be reversed and the Secretary's determination, requiring repayment of the excess benefits received in 1962, should be reinstated.

CARL EARDLEY,
Acting Assistant Attorney General,

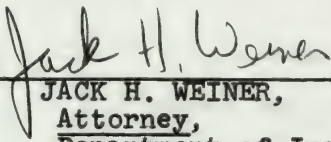
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SEPTEMBER 1967.

CERTIFICATE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



JACK H. WEINER,
Attorney,
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AFFIDAVIT OF SERVICE

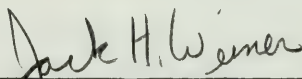
DISTRICT OF COLUMBIA
CITY OF WASHINGTON

} ss.

JACK H. WEINER, being duly sworn, deposes and says:

That on September 29 , 1967, he caused three copies of the foregoing brief and appendix for the appellant to be served upon appellee by placing them in the United States Mail, air mail, postage prepaid, in an envelope addressed to counsel as follows:

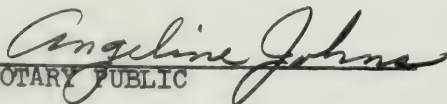
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JACK H. WEINER,
Attorney,
Department of Justice,
Washington, D.C. 20530.

Subscribed and sworn to before
me this 29th day of September, 1967.

[Seal]



NOTARY PUBLIC

My Commission expires on April 14, 1972.

A P P E N D I X

STATUTES

The Social Security Act, 42 U.S.C. 402 et seq., in effect at the time in controversy, provides in pertinent part:

§ 402 Old-age and survivors insurance benefit payments -- Old-age insurance benefits

(a) Every individual who --

(1) is a fully insured individual (as defined in section 414(a) of this title),

(2) has attained age 62, and

(3) has filed application for old-age insurance benefits or was entitled to disability insurance benefits for the month preceding the month in which he attained the age of 65,

shall be entitled to an old-age insurance benefit for each month, beginning with the first month after August 1950 in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies. Except as provided in subsection (q) of this section, such individual's old-age insurance benefit for any month shall be equal to his primary insurance amount (as defined in section 415(a) of this title) for such month.

§ 403 Reduction of insurance benefits -- Maximum benefits

(b) Deductions on account of work.

Deductions, in such amounts and at such time or times as the Secretary shall determine, shall be made from any payment or payments under this subchapter to which an individual is entitled, and from any payment or payments to which any other persons are entitled on the basis of such individual's wages and self-employment income, until the total of such deductions equals --

(1) such individual's benefit or benefits under section 402 of this title for any month, and

(2) if such individual was entitled to old-age insurance benefits under section 402(a) of this title for such month, the benefit or benefits of all other persons for such month under section 402 of this title based on such individual's wages and self-employment income,

if for such month he is charged with excess earnings, under the provisions of subsection (f) of this section, equal to the total of benefits referred to in clauses (1) and (2). If the excess earnings so charged are less than such total of benefits, such deductions with respect to such month shall be equal only to the amount of such excess earnings.

* * *

(f) Months to which earnings are charged.

For purposes of subsection (b) of this section --

(1) The amount of an individual's excess earnings (as defined in paragraph (3)) shall be charged to months as follows: There shall be charged to the first months of such taxable year an amount of his excess earnings equal to the sum of the payments to which he and all other persons are entitled for such month under section 402 of this title on the basis of his wages and self-employment income (or the total of his excess earnings if such excess earnings are less than such sum), and the balance, if any, of such excess earnings shall be charged to each succeeding month in such year to the extent, in the case of each such month, of the sum of the payments to which such individual and all other persons are entitled for such month under section 402 of this title on the basis of his wages and self-employment income, until the total of such excess has been so charged. Where an individual is entitled to benefits under section 402(a) of this title and other persons are entitled to benefits under section 402(b), (c), or (d) of this title on the basis of the wages and self-employment income of such individual, the excess earnings of such individual for any taxable year shall be charged in accordance with the provisions of this subsection before the excess earnings of such persons for a taxable year are charged to months in such individual's taxable year. Notwithstanding the preceding provisions of this paragraph, no part of the excess earnings of an individual shall be charged to any month (A) for which such individual was not entitled to a benefit

under this subchapter, (B) in which such individual was age seventy-two or over, (C) in which such individual, if a child entitled to child's insurance benefits, has attained the age of 18, or (D) in which such individual did not engage in self-employment and did not render services for wages (determined as provided in paragraph (5) of this subsection) of more than \$100

* * *

(3) For purposes of paragraph (1) and subsection (h) of this section, an individual's excess earnings for a taxable year shall be his earnings for such year in excess of the product of \$100 multiplied by the number of months in such year, except that of the first \$500 of such excess (or all of such excess if it is less than \$500), an amount equal to one-half thereof shall not be included. The excess earnings as derived under the preceding sentence, if not a multiple of \$1, shall be reduced to the next lower multiple of \$1.

(4) For purposes of clause (D) of paragraph (1) --

(A) An individual will be presumed, with respect to any month, to have been engaged in self-employment in such month until it is shown to the satisfaction of the Secretary that such individual rendered no substantial services in such month with respect to any trade or business the net income or loss of which is includible in computing (as provided in paragraph (5) of this subsection) his net earnings or net loss from self-employment for any taxable year. The Secretary shall by regulations prescribe the methods and criteria for determining whether or not an individual has rendered substantial services with respect to any trade or business.

* * *

(h)(1)(A) Report of earnings to Secretary.

If an individual is entitled to any monthly insurance benefit under section 402 of this title

during any taxable year in which he has earnings or wages, as computed pursuant to paragraph (5) of subsection (f) of this section, in excess of the product of \$100 times the number of months in such year, such individual (or the individual who is in receipt of such benefit on his behalf) shall make a report to the Secretary of his earnings (or wages) for such taxable year. Such report shall be made on or before the fifteenth day of the fourth month following the close of such year and shall contain such information and be made in such manner as the Secretary may by regulations prescribe. Such report need not be made for any taxable year (i) beginning with or after the month in which such individual attained the age of 72, or (ii) if benefit payments for all months (in such taxable year) in which such individual is under age 72 have been suspended under the provisions of the first sentence of paragraph (3) of this subsection.

* * *

§ 411 Definitions relating to self-employment

* * *

(e) Taxable year.

The term "taxable year" shall have the same meaning as when used in chapter 1 of Title 26; and the taxable year of any individual shall be a calendar year unless he has a different taxable year for the purposes of chapter 1 of Title 26, in which case his taxable year for the purposes of this subchapter shall be the same as his taxable year under chapter 1 of Title 26.

The Internal Revenue Code, 26 U.S.C. provides in pertinent part:

§ 441 Period for computation of taxable income

* * *

(b) Taxable year.

For purposes of this subtitle, the term "taxable year" means --

(1) The taxpayer's annual accounting period, if it is a calendar year or a fiscal year;

(2) The calendar year, if subsection (g) applies; or

(3) The period for which the return is made, if a return is made for a period of less than 12 months.

* * *

§ 443 Returns for a period of less than 12 months.

(a) Returns for short period

A return for a period of less than 12 months (referred to in this section as "short period") shall be made under any of the following circumstances.

(1) Change of annual accounting period.

When the taxpayer, with the approval of the Secretary or his delegate, changes his annual accounting period. In such a case, the return shall be made for the short period beginning on the day after the close of the former taxable year and ending at the close of the day before the day designated as the first day of the new taxable year.

(2) Taxpayer not in existence for entire taxable year.

When the taxpayer is in existence during only part of what would otherwise be his taxable year.

(3) Termination of taxable year for jeopardy.

When the Secretary or his delegate terminates the taxpayer's taxable year under section 6851 (relating to tax in jeopardy).

MAXIMUM BENEFITS

[70]Section 102 of the bill replaces subsections (a), (b), and (c) of section 203 of the present Social Security Act with a new section 203(a). The new subsection liberalizes the maximum amount of monthly benefits payable, for months after the first calendar month following the month in which the bill is enacted. Under the House bill, the new provisions would have been effective for months after 1949.

Under existing law, the benefits payable on the basis of an individual's wages, if they exceed \$20 for any month, are reduced for such month to \$85, to twice his primary benefit, or to 80 percent of his average monthly wage, whichever is smallest, but not below \$20. The bill increases the figure of \$85 to \$150, eliminates the limitation of twice the primary insurance benefit, and raises the figure of \$20, below which the total of benefits may not be reduced, to \$40. This result was accomplished in the House bill by establishing a minimum average monthly wage of \$50, so that application of the 80-percent maximum could not reduce family benefits below \$40. Your committee has eliminated the provision for a minimum average monthly wage and it thus becomes necessary to restore to the bill a specific dollar minimum below which the operation of the maximum of 80 percent of the average monthly wage will not reduce benefits.

Thus subsection further provides that when the beneficiary group includes children who would be entitled to child's benefits on the basis of more than one wage record (but for the provisions concerning simultaneous entitlement to benefits in section 202(k)(2)(A)), the total benefits payable shall be reduced to the lesser of \$150 or 80 percent of the sum of the average monthly wages of all the insured individuals on whose wage records such benefits would otherwise be payable, but in no case to less than \$40. This provision complements the provisions on simultaneous entitlement to benefits in paragraphs (1) and (2)(A) of section 202(k) of the Social Security Act as amended by the bill. Under the simultaneous entitlement provisions all children entitled to child's insurance benefits on the same two or more wage records would be restricted to benefits based on only the one of such records which produces the highest primary insurance amount. To prevent this restriction from unduly limiting the total amount payable to children in the same family, the above provision for combining all the wage records, on which any of the family are entitled, for determining

* House Report No. 1300, 81st Cong., 1st Sess., pp. 62-65
is for the most part a repetition of the Senate Report.

the maximum benefit was inserted. It did not appear in the bill as passed by the House. It is, however, an essential [71] companion to the changes made in existing law (and in the House bill) by paragraphs (1) and (2)(A) of section 202(k).

Under the present law, the total of the family benefits for a month is reduced to the maximum permitted by section 203(a) prior to any deductions on account of the occurrence of any event specified in the law (such as work for wages in excess of the maximum permitted). Section 203(a) as amended by the bill reverses this procedure and provides that the reduction in the total of benefits for a month is to be made after the deductions. As a result, larger family benefits will be payable in many cases. For example, if a worker with a primary insurance amount of \$40 and an average monthly wage of \$80 dies leaving a widow and two children, all of whom have filed claims and are entitled to benefits, the maximum of the benefits payable to these survivors for any month is \$64 (80 percent of \$80). Prior to the application of the maximum, the widow would be entitled to a benefit of \$30 and each child to a benefit of \$25 (three-fourths of the primary insurance amount for the widow and one-half of such amount for each child, with an additional one-fourth of such amount divided equally between the two children). Under the procedure in existing law, these amounts would be reduced to \$24 for the widow and \$20 for each child (so as to total \$64). The reduction in these amounts applies even though one beneficiary, such as the widow, suffers a loss of her benefit because she earns more than the permitted amount for services in covered employment. Under section 203(a) as amended by the bill, the maximum would be applied for any month after any deductions for that month so that, where the widow works as in the above case, each child would receive the full \$25.

The bill eliminates as unnecessary the present provision of section 203(b) that benefits payable on any wage record shall not be less than \$10 per month. Since the bill establishes a minimum primary insurance amount of \$20 in any case where the average monthly wage is less than \$34, the minimum benefit payable on such wage record is \$10 if the only benefit payable is a parent's benefit and \$15 in the case of any other single survivor benefit payable on such wage record; in the case where the average monthly wage is \$34 or more, corresponding figures are \$12.50 and \$18.75, respectively. The provision of the existing section 203(c) under which each benefit, except the old-age insurance benefit, is proportionately decreased when there is a decrease in the total family benefits is transferred by the bill (as was true in the case of the House bill) to section 203(a).

Except for the combination of wage records for purposes of the family maximum in cases of children entitled to more than one wage record, which did not appear in the bill as passed by the House, and for the change in effective dates, the bill as reported by your committee and the House bill are the same on this matter.

DEDUCTIONS FROM BENEFITS

Section 103 of the bill revises rather extensively the provisions of the present Social Security Act relating to deductions from benefits. Subsections (d), (e), (f), (g), and (h) of section 203 of the present act are replaced by subsections (b), (c), (d), (e), (f), (g), (h), (i), and (j) of section 203 of the amended act.

* * *

[72] Deductions from dependents' benefits because of work by old-age beneficiary

Section 203(c) provides for the making of deductions from dependents' benefits for any month in which the old-age beneficiary suffers a deduction with respect to his own benefit. Paragraph (1) of this subsection, which is similar to existing law, provides that deductions from a wife's, husband's, or child's benefits are to be made for months in which the old-age beneficiary suffers a deduction under section 203(b)(1) (which relates to the rendition of services for wages of more than \$50). Paragraph (2) adds a comparable provision so as to deduct a wife's, husband's, or child's benefit for months in which the old-age beneficiary suffers a deduction under section 203(b)(2) (which relates to the charging to a month of net earnings from self-employment of more than \$50).

Occurrence of more than one event

The first sentence of section 203(d), which is similar to present law, provides that if more than one of the events specified in subsections (b) and (c) of section 203 occurs in any month, which would occasion deductions equal to a benefit for such month, only an amount equal to such benefit is to be deducted. The second sentence provides that the charging of net earnings from self-employment to any month shall be treated as an event occurring in the month to which such net earnings are charged.

Months to which net earnings from self-employment are charged

Section 203(e) provides the method for charging net earnings from self-employment to particular months of the taxable year for the purposes of determining the deductions required under the provisions of sections 203(b)(2) and 203(c)(2).

Paragraph (1) provides that if an individual's net earnings from self-employment for the taxable year are not more than the produce of \$50 times the number of months in such year, no month in such year is to be charged with more than \$50 of net earnings from self-employment. Thus, if an individual has net earnings from self-employment of less than \$600 (for a taxable year of 12 months) no deduction would be imposed under section 203(b)(2) or 203(c)(2) even though all of the net earnings from self-employment may have been earned during a period of a few months in such year at a rate in excess of \$50 per month.

Paragraph (2) provides the method for determining the months of a taxable year to be charged with net earnings from self-employment in the case of an individual whose net earnings from self-employment for his taxable year exceed the product of \$50 times the number of months of such year. In this case, each month of the year is first to be charged with \$50 of net earnings from self-employment, then the amount of net earnings in excess of the produce is to be charged in units of \$50, beginning with the last month of the taxable year and progressing toward the first month of the taxable year. The paragraph provides further that no part of the excess net earnings from self-employment is to be charged to any month in which the individual was not entitled to a benefit under title II; in which an event described in paragraph (1), (3), or (4) of section 203(b) occurred; in which the individual was age 75 or over; or in which the individual did not engage in self-employment.

In connection with the charging of the excess, it should be noted that, in the case of an excess amount of net earnings which is not divisible by \$50, it is possible to charge a unit of excess which is less than \$50. For example, an individual who has a full 12-month taxable year and has net earnings from self-employment of \$651 would have two units of excess net earnings from self-employment, one of \$50 and one of \$1, and would thus be potentially subject to deductions for 2 months of the year.

Generally, the taxable year of an individual will be a calendar year, or a fiscal year, containing 12 months. The most common case of a [74] taxable year of less than 12 months will occur by reason of the death of a beneficiary. If, for example, a beneficiary having a taxable year which is a calendar year should die on June 2, his taxable year for the year of his death would begin on January 1 and end on June 2. If his net earnings from self-employment for the short taxable year are not more than \$300 (\$50 times 6 months), no month in such taxable year would be charged with more than \$50. If his net earnings from self-employment for such year exceed \$300, paragraph (2) of subsection (e) would be applicable in determining whether deductions from benefits are to be made.

The months to which the excess net earnings from self-employment may not be charged include those during which the individual performed services for wages of more than \$50, and those during which an individual under retirement age drawing benefits as a widow or former wife divorced did not have a child in her care. These provisions prevent the charging of the excess to months for which a deduction has already been imposed. The excess net earnings from self-employment are not to be charged to months during which the beneficiary was age 75 or over, because no deductions are imposed for such months. These provisions and the provision that the excess net earnings from self-employment may not be charged to months during which the individual was not entitled to benefits under this title prevent the dissipation of the excess net earnings from self-employment through charging them to months for which deductions may not be imposed.

It should be noted that a deduction for a particular month may be imposed under section 203(b)(2) by reason of an individual's net earnings from self-employment for the taxable year even though the individual, as a matter of fact, may not have earned \$50 from his trade or business in that particular month. For example, if an individual entitled to old-age insurance benefits engaged throughout the taxable year in business as a real-estate broker and earned more than \$1,150 for the entire year, he will suffer a deduction under section 203(b)(2) for each month of the year even though during several months of the year he may have operated at a loss through an inability to negotiate any sales in those months.

The following example will illustrate the charging to months of net earnings from self-employment for the purposes of paragraph (2) of section 203(e). Beneficiary X, who was entitled to old-age insurance benefits during the entire year and was under 72 years of age, owned and actively operated a fruit stand during the entire year. His net earnings from the business amounted to \$740. During the month of December he worked a few hours a day as an employee at a store in connection with the Christmas trade, and received wages therefor in excess of \$50. Under paragraph (2), each month of the year would be charged with \$50, and the excess (\$140) would be charged as follows: \$50 to November, \$50 to October, and \$40 to September. The month of December, for which a deduction would be imposed under section 203(b)(1) by reason of wages earned in excess of \$50, would not be charged with any part of the \$140 excess. Beneficiary X, therefore, would suffer deductions under section 203(b)(2) for the months of September, October, and November, since more than \$50 of net earnings from self-employment is charged to each of those months.

[75] The individual is to be given an opportunity to show that he did not render substantial services with respect to any trade or business during certain months of the year. In that case, the excess net earnings from self-employment are not to be charged to those months but are to be charged to any other months during which he did render substantial services, and to which the charging of the excess is not prohibited by paragraph (2). Thus, benefit deductions would be imposed for any month, as a result of the self-employment of a beneficiary, only when the beneficiary both had substantial net earnings from self-employment in the year and rendered substantial services in a trade or business in that month.

Paragraph (3)(A) defines the term "last month of such taxable year" as the last calendar month of the taxable year to which the charging of net earnings from self-employment in excess of the exempt amount is not prohibited under paragraph (2). An application of the function of paragraph (3)(A) is shown by the following example: John, who attained 18 years of age in July 1960, was entitled to child's insurance benefits for the months of January through June of that year. In May he started a radio repair business, and from May through December he had net earnings of \$900. In applying paragraph (2), each month of the entire year would be charged with \$50 of the net earnings and the excess (\$300) would be charged as follows: \$50 to June, and \$50 to May; the remainder amounting to \$200 would be disregarded (in any event, it could be charged only to May and June and would then have no effect since the charging already done would result in no benefits being paid for those months anyhow). The month of June is considered as the last month of the taxable year, for the purposes of paragraph (2), since John was not entitled to child's insurance benefits for months after June. No part of the \$300 excess would be charged to months prior to May, since John was not engaged in self-employment for any months prior to May.

* * *

No. 21950

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN W. GARDNER, Secretary of Health,
Education and Welfare,

Appellant

v.

PAUL E. SLOANE and ALYSE S. SLOANE,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR APPELLEES

FILED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

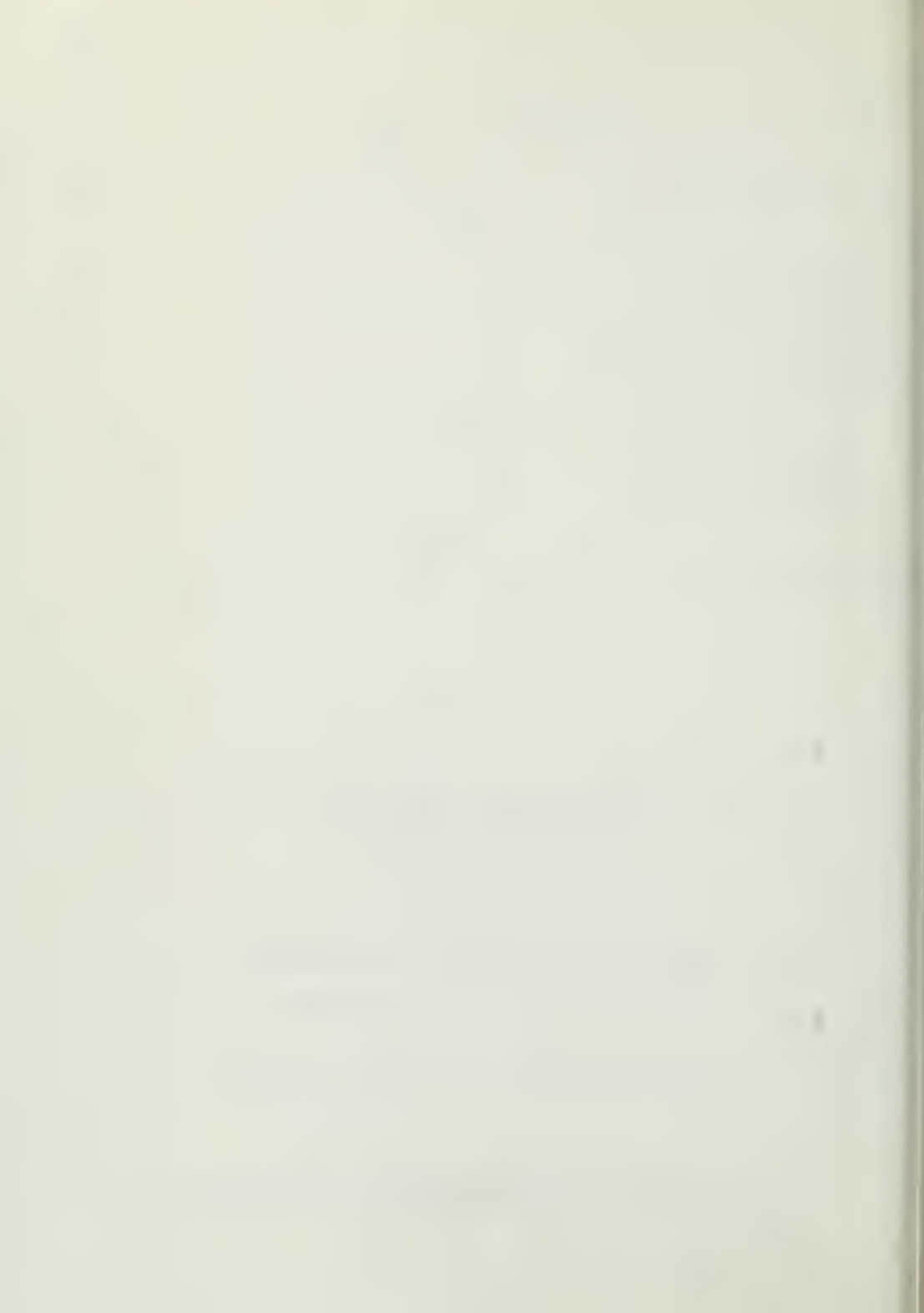
No. 21950

JOHN W. GARDNER, Secretary of Health,
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v.

PAUL E. SLOANE and ALYSE S. SLOANE,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA



REPLY BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT.

The jurisdiction of this court is based upon U. S. Const. Art. III, § 1 and § 2, and upon ²⁸U. S. C. 1291, and 42 U. S. C. 403 (f) (1) and 405 (g), and is predicated upon precisely the pleadings, facts and procedural circumstances set forth in the Opening "Brief And Appendix For Appellant" herein, (pp. 1 and 2).

STATEMENT OF CASE AND ONLY ISSUE

Appellant's statement of case, (pp. 2-5) is correct but insufficiently sets forth the statutory provisions involved. The only issue is whether these provisions of the Social Security Act mean precisely what they say, to-wit:-

"----Where an individual is entitled to benefits under section 402(a) of this title----on the basis of----self-employment income of such individual, the excess earnings of such individual for any taxable year shall be charged in accordance with the provisions of this subsection before the excess earnings of such persons for a taxable year are charged to months in such individual's taxable year. Notwithstanding the preceding provisions of this paragraph, no part of the excess earnings of an individual shall be charged to any month----in which such individual was age seventy-two or over----. (403(f)(1)).

----an individual's excess earnings for a taxable year shall be his earnings for such year in excess of the product of \$100 multiplied by the number of months in such year----" (403(f) (3), prior to its amendment July 30, 1965.))

"If an individual is entitled to any monthly insurance benefits----during any taxable year in which he has earnings----such individual----shall make a report to the secretary of his earning----for such taxable year. ----Such report need not be made for any taxable year beginning with or after the month in which such individual attained the age of 72." (403)(h)(1)(A) (Emphasis in each instance added.))

According to each of these provisions there would appear to be no ambiguity on the following four points:-

(1) "no part of excess earning of an individual shall be charged to any one month----in which such individual was age seventy-two or over", - "Notwithstanding the preceding provisions of this paragraph";

(2) the "preceding provisions" of paragraph 403(f)⁽¹⁾/were thereby superceded, (if in any wise inconsistent with the foregoing specific exceptions), which would include the provisions, i. e., - "the excess earning of such individual for any taxable year shall be charged----before the excess earnings are charged to months in such individual's taxable year", and it would also supercede any conflicting portions of said section 402(a), and of other "provisions of this subsection" (403(f))⁽¹⁾, incorporated therein by reference. Said section 402(a) also incorporates section 415(a), subject to subsections 415 (b), (c), and (d) thereof, by reference. Section 411 of said Act is by its own provisions made applicable to Section 403(f), and to all other sections and paragraphs of the Social Security Act, (as claimed by appellant), and therefore is subject to the foregoing clause, "notwithstanding the preceding provisions of this paragraph";

(3) "excess earnings for a taxable year shall be----excess of the product of \$100 multiplied by the number of months in such year", thereby clearly implying that such "number of months in such year" could be less than twelve months, since a year could never be more than twelve months; and,



(4) "Such report need not be made for any taxable year beginning with or after the month----such individual attained the age of 72."

Appellant's brief contains no discussion of these statutory provisions. Upon what basis, then, does appellant claim that he can charge the excess earnings for any months after the "individual attained the age of 72", in computing the "excess earnings for any taxable year" in which said 72nd age was attained? He alleges two bases.

I.

APPELLANT CLAIMS THAT A TWELVE MONTHS' "TAXABLE YEAR" NECESSARILY APPLIES, AS DEFINED IN THE INTERNAL REVENUE CODE, SINCE SAID CODE DOES NOT PURPORT TO INVOLVE ANY SUCH EXCEPTION AFTER AGE 72, AS DOES THE SOCIAL SECURITY ACT.

The appellant's brief correctly claims that the Social Security Act and the preceding provisions of Section 403(f) (1), do contain conditions to which the exception in the year of appelle's 72nd birthday requires a "notwithstanding" clause. Appellant states that the Act:-

"expressly incorporates the definition of taxable year contained in the Internal Revenue Code" (p.8), to-wit:- "42 U.S.C. 411(e) (App. 4a), expressly defines the term 'taxable year' to have the 'same meaning' as when used in the Internal Revenue Code and that 'the taxable year of any individual shall be a calendar year'. [except that] under the Internal Revenue Code, 26 U.S.C. 441(b) (3), 26 U.S.C. 443, returns can be made for periods of less than twelve months only in specified enumerated circumstances." (p.10). (See also, p.4).

The Internal Revenue Code thus enumerates three circumstances in which less than twelve months represented a "taxable year" for purposes of that code. These are listed by appellant, and naturally do not include the fourth set of circumstances which were expressly only applicable to the Social Security Act, but also recognize less than 12 months for a "taxable year". This fourth exception in the latter Act was set forth after the "Notwithstanding

of this paragraph" of this latter Act, which was ^{otherwise} necessarily dependent on said Section 411 thereof, incorporating this provision of the Internal Revenue Act by reference.

Said Section 411, entitled "Definitions relating to self-employment", expressly provides in its opening sentence that certain definitions shall apply - "For the purposes of this subchapter" - (which is "Subchapter II" entitled: "Federal Old Age, Survivors And Disability Insurance Benefits", to-wit, the Social Security Act.) Thus, Section 411 furnishes definitions that are applicable to all sections of the Social Security Act, Title 42, from 401 through 428 Inclusive, - as well as to a number of additional sections - thereby necessarily including sections 402, 403, 411 and 415. Said sub-section 411 by its said introductory clause, became a part of every other section of the act, including the following: - "For the purpose of this subchapter - The term taxable year shall have the same meaning as when used in chapter 1 of Title 26" of the Internal Revenue Code, which brought this definition within the limitation of said "Notwithstanding the preceding provisions" clause of 403(f)(1). It will be noted that this definition would clearly and precisely apply, with no "Notwithstanding" limitation, to those six "taxable years" of the tax paying individual following ^{that of} his 65th birthday and preceding the year of his 72nd birthday. Only those two years in which the 65th birthday and the 72nd birthday occurred would constitute taxable years of less than 12 months each, under 403(f)(1)(B).

Appellant has cited no legal precedent, nor have we found any, that upholds his contention for utilizing excess earnings received for a full twelve in an individual's 72nd year, months' year, /or that sustains the Social Security Administration's regulation 1813 to like effect. (This Regulation is set forth in Tr. 64, 67, and App. Brief pp. 6 and 11.) The Social Security Act, under its "Notwithstanding" clause

(last sentence of Sec. 403(f)(1), has merely added four additional situations (designated (A), (B), (C) and (D)), to the three situations theretofore contained in the Internal Revenue Code (26 U.S.C. 441(b)(3) and 443)), recognized in appellant's brief (p. 4 and footnote p.10), where the "taxable year" is recognized as consisting of less than twelve months in these situations. We are here only concerned with situation (B), added by the Security Act, forbidding that any "excess earnings----shall be added to any month----(B) in which such individual was age seventy-two or over". The Social Security Act covers many situations never contemplated by the Internal Revenue Code requiring special provisions. While it adopts the definition of "taxable year" contained in the R evenue Code applicable to most situations, the Security Act nevertheless covered additional exceptions thereto, as provided for in Sec. 403 (f) (1), under its "Notwithstanding" sentence. Otherwise, why should the Social Security Act have also added the further provision that the taxed individual "need not" report his "earnings----for any taxable year---- beginning with or after the month in which such individual attained the age of 72" (403(h)(1)(A)? Why should a report for these latter months be waived if the Administration was required to include them for the full twelve months of that year in its computations? Appellant does not answer these questions.

II.

APPELLANT INCORRECTLY STATES THAT DISTRICT COURT'S DECISION RECOGNIZED THAT APPELLANT'S PAST CONSTRUCTION OF THIS STATUTE HAD BEEN REASONABLE, AS APPELLANT'S QUOTATION FROM SAID DECISION CONTAINED NO SUCH RECOGNITION.

The District Court's decision did declare as follows:-

The statute is ambiguous at best. It is possible to construe it as the Administration has, if great emphasis is placed on "taxable year" as a word of art. ---However, this construction is contrary to one of the purposes of the act, which is to allow claimants to earn as much as they desire without deduction from their benefits after the age of 72. Further, the wording of that part of paragraph 403(f) (3), which states;---- "the product of \$100 multiplied by the number of months in such year----" is significant. Since there are always twelve months in a year, this provision would be mere surplusage if not intended to reduce the length of the taxable year when a claimant is not subject to the provision for the entire year. If the position of the Secretary is correct, it would seem for example, that where a claimant had substantial income early in the taxable year in which he became sixty-five and made initial application for benefits under the old-age provisions of the act, that his previous earnings before submitting a claim would logically be used to eliminate payments in that year. Yet, in this very case there is no evidence that this factor was considered when Mr. Sloane applied for and received full benefits as of July, 1955, when he reached the age of sixty-five. (Emphasis, the court's. Decision pgs. 6 & 7.)

This statement of Judge Zirpoli is a far cry from the declaration by appellant that the District Court had thereby admitted that the Administration's present interpretation "is quite clearly a reasonable interpretation", which "courts may therefore respect", (as appellant applies these quoted words from the decision in Udall v Tallman (380 U.S. 1, 4, 16.)) This latter decision is the only case cited by appellant in his brief. Judge Zirpoli in his above decision did not adopt the language of the Udall decision to the effect that the administrative "interpretation may not be the only one permitted by the language of the order" nor that it was "a reasonable interpretation". (App. Brief, p.14, also cited on p. 9.) These words are very different



from those of Judge Zirpoli, (even as quoted by appellant, pp. 13, 14) and do not justify the following argument of appellant:-

"Indeed, as the district court itself recognized, 'It is possible to construe [the law] as the Administration has', since this construction 'is consistent with the use of the income tax returns to check the earnings of claimants during a taxable year '. (R 26). In these circumstances, where the district court itself recognized that the administrative interpretation was reasonable, the district court, we submit, should not have substituted its own interpretation for that of the administration's.'" (Emphasis added.)

It will here be noted that appellant has here incorrectly inferred that Judge Zirpoli meant "reasonable", where he used the word "possible". The words are not interchangeable. Many interpretations are "possible", that are not "reasonable". The court's detailed explanation of the reasons for its interpretation would have been meaningless if it had not intended to show wherein the Administration's interpretation was unreasonable.

III.

A SPECIAL PROVISION OF A STATUTE RELATING TO A GENERAL SUBJECT GOVERNS IN RESPECT TO THAT SUBJECT.

This is the situation here. California Jurisprudence (45 Cal. Jur. 2d, page 628, Sec. 119 of "Statutes", notes 17-20 inclusive) sets forth this principle:-

"If possible, effect should be given to both general and special provisions of a statute. Phrases used in the statute must be construed in connection with others, with which they are associated, and particular expressions qualify general. If they are inconsistent and cannot be reconciled, a general provision is controlled by a special provision that is treated as an exception to the general provision. Hence a specific provision relating to a particular subject will govern with respect to that subject, as against a general provision, though the latter standing alone would be broad enough to include the subject. And where two provisions treat a matter, one

specially and solely and the other merely incidentally, the former will prevail."

Zajicek v Koolvent Metal Awning Corp. 283 F2d 127; holding:

"specific language controls general."

See also: - Long Beach City Sch. Dist. v Payne, 219 C 598, 28 P 2d 663,
Rose v State, 19 C 2d 713, 123 P 2d 505;
People v Wood, 161 CA2d 24, 325 P 2d 1014;

C.C.P. Sec. 1859 provides:-

"when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."

The same principle is consistently applied throughout the Federal

Courts:-

Korte v U. S. (Cal.) 266 F2d 633, Certiorari denied 358 U.S. 928,
79 S. Ct. 318;

Bradford Nov. Co. v Manheim (N. Y.) 156 Fed Supp 489;

U. S. v Mattio (Cal.) 17 F. 2d 879;

Aaron v U. S. (Oak.) 204 F 943, 123 CCA 265;

Rodger v U. S., 36 Ct. Cl. 266, Affmd. (1902) 22 S.Ct. 582;
185 U. S. 83.

The implication from a proviso in a statute is that any proceeding not covered by the exception is to be subject to the rule.

Geo. Moore Ice Cream Co. v Rose, 289 U.S. 373, 53 S.Ct. 522
77 L. ed. 1265.

We therefore respectfully submit that neither of appellant's grounds can be accepted for ignoring the "notwithstanding" exceptions in the Social Security Act wherein a "taxable year" of less than 12 months is recognized, whereas otherwise the 12 months requirement for a "taxable year" is applied, even as other exceptions are allowed under the Internal Revenue Code.

November 21, 1967.

Paul E. Sloane
Paul E. Sloane

CERTIFICATE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Paul E. Sloane

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AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
)
CITY AND COUNTY OF SAN FRANCISCO) ss.

PAUL E. SLOANE, being duly sworn, deposes and says:

That on November 21, 1967, he caused copies of the foregoing
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in the United States Mail, postage prepaid, in envelopes addressed to
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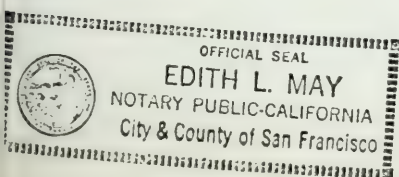
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this 21st day of November, 1967.

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Edith L. May
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My commission expires: My commission expires May 5, 1969





No. 21,953 ✓

**United States Court of Appeals
For the Ninth Circuit**

STANDARD OIL COMPANY OF CALIFORNIA, WESTERN OPERATIONS, INC., VS. NATIONAL LABOR RELATIONS BOARD, 	} <i>Petitioner,</i> <i>Respondent.</i>
--	--

PETITIONER'S OPENING BRIEF

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PETITIONER'S OPENING BRIEF

JURISDICTIONAL STATEMENT

This is a proceeding to review an order of the National Labor Relations Board holding that petitioner (Standard Oil Company of California, Western Operations, Inc.) violated sections 8(a)(5) and 8(a)(1) of the Labor Management Relations Act (61 Stat. 136, 141, 29 U.S.C. 158(a)(5) and 158(a)(1))¹ by refusing to furnish home addresses of employees represented by a labor union (Oil, Chemical and Atomic Workers International Union, Richmond, California, Local 1-561, AFL-CIO) upon the request of that union.

The decision and order of the National Labor Relations Board (R. Vol. I, pp. 28-40) was issued on June 30, 1967,

¹These and other relevant provisions of that Act are printed in Appendix A hereto.

and the petition for review (R. Vol. I, pp. 41-45) was filed on July 5, 1967.

Petitioner operates an oil refinery at Richmond, California (R. Vol. I, p. 29). The acts which the Board held to constitute unfair labor practices occurred in the State of California (R. Vol. I, pp. 29-33; General Counsel's Exhibits 3, 6, 7, 8, 10 and 11).

This Court has jurisdiction under section 10(f) of the Labor Management Relations Act, as amended (61 Stat. 136, 148-149; 72 Stat. 941, 946; 29 U.S.C. 160(f)).

STATEMENT OF THE CASE

Standard Oil Company of California, Western Operations, Inc. (hereinafter referred to as "the Company"), is engaged in the refining and sale of petroleum and petroleum products, including the operation of a refinery at Richmond, California, where it employs approximately 2600 persons (R. Vol. I, pp. 15, 29). Oil, Chemical and Atomic Workers International Union, Richmond, California, Local 1-561, AFL-CIO (hereinafter referred to as "the Union") represents approximately 1500 production and maintenance employees, about 50 per cent of whom are members of the Union (Vol. I, p. 29).

During the period involved in the instant case, the relations between the Union and the Company were governed by a collective bargaining agreement (General Counsel's Exhibit 2) signed on March 10, 1965 (*ibid.*, p. 52). That agreement, which went into effect on February 15, 1965, provided it would be renewed annually in the absence of written notice of termination (*ibid.*, Article 2,

p. 2). No such notice having been served, the agreement remained in effect until February 15, 1967 (R. Vol. II, pp. 14-15, 229-230).

The agreement provides, *inter alia*, for maintenance of Union membership with an opportunity for members to withdraw from the Union on specified terms (General Counsel's Exhibit 2, Article 3, p. 3), the furnishing of seniority lists to the Union (*ibid.*, Article 8, pp. 8-10), representation of employees by Union stewards in each unit (*ibid.*, Article 19, pp. 46-48), and the furnishing by the Company, upon application by the Union, of appropriate locations for Union bulletin boards (*ibid.*, Article 24, p. 50).

It is a long-standing Company policy, followed without deviation, not to give out the home addresses of employees (R. Vol. II, p. 225).

This case arises out of a letter dated April 5, 1965, from Victor J. Van Bourg, an attorney for the Union, to William L. Diedrich, Jr., an attorney for the Company (General Counsel's Exhibit 3). Mr. Van Bourg's letter referred to employee orientation programs for newly hired employees, in the course of which unions are discussed. The letter requested "a complete list of all of the employees at Standard Oil Refinery in Richmond with the names, addresses and social security number, if possible, so that the Union at least can counter the company propaganda by mass mailing." No other reason for the Union's requesting the subject information was given (*ibid.*). T. M. Sheehy, General Manager of the Company's Richmond Refinery, on April 15, 1965, wrote the Union in reply to Mr. Van Bourg's letter that the

Company had just given the Union a seniority list on April 8, 1965, which showed the name of each employee represented by the Union and that the Company was not willing to provide the Union with home addresses of its employees (General Counsel's Exhibit 6).

On the same date as Sheehy's letter to the Union, April 15, 1965, Mr. Van Bourg addressed a second letter to Mr. Diedrich (General Counsel's Exhibit 7). This letter referred to a fifty-page orientation booklet entitled "You and your Company" and expressed Mr. Van Bourg's objections to a statement therein that union representation is not necessary for employees to enjoy fair treatment and good working conditions (General Counsel's Exhibit 7).²

²The portion of the booklet objected to by Mr. Van Bourg was as follows:

"What about unions"

"On the preceding pages of this booklet, we've tried to cover, in a general way, the many policies and programs developed by your Company's management to assure you fair treatment and to provide a rewarding career.

"We sincerely believe that good employee relations can be maintained and essential employee needs fulfilled through sound management administration, without the necessity of union organization and representation. Your Company's wages, hours, and working conditions are among the best in industry, and its employee relations policies are designed to promote fair play and mutual respect. Policies like these are essential for 43,000 people to work together effectively. This also requires a great deal of cooperation and understanding, and a healthy regard for the rights of others.

"As for union membership, it is your Company's belief that representation by an outside organization is not necessary in order for employees to enjoy fair treatment and good working conditions. However, this is something that all employees should decide for themselves after careful consideration of all the facts. While your Company recognizes your right to join a union, it does not believe that you should be forced to join a union as a condition of employment and is opposed to all forms of compulsory unionism" (General Counsel's Exhibit 13, pp. 31-32).

The Board found that the Company "was of course privileged thus to express its views" (R. Vol. I, p. 36).

Mr. Van Bourg further stated that he had been advised that this booklet had been sent to Company employees by mail and requested, on behalf of the Union "a complete mailing list of Standard Oil employees so that we may send them counter documentation and statements" (General Counsel's Exhibit 7). No other reason was given for the Union's request for the home addresses of Company employees.

Mr. Diedrich replied in a letter dated April 26, 1965, that he had advised the Company that the statements in the booklet "You and your Company" were well within the Company's right of free speech and further stated that the Union had just been given a complete seniority list which fulfilled the Company's contractual and legal obligations (General Counsel's Exhibit 8).

Neither of the foregoing requests for the home addresses was limited to the home addresses of the employees in the unit represented by the Union; they requested the home addresses of "all of the employees at Standard Oil Refinery in Richmond" (General Counsel's Exhibit 3) and "a complete mailing list of Standard Oil employees" (General Counsel's Exhibit 7). Of the approximately 2,600 production and maintenance and office employees at the Richmond Refinery, only about 1,500 are represented by the Union (R. Vol. II, pp. 33-34).

On May 12, 1965, the Company initiated interim negotiations during the term of the existing collective bargaining agreement by making a proposal to change certain benefit plans referred to in the collective bargaining agreement between the Union and the Company (R. Vol. II, pp. 43-44). These negotiations began on May 20,

1965, and were successfully concluded near the end of July 1965 (R. Vol. II, p. 41). At no time during the negotiations did the Union request the Company, either orally or in writing, to supply it with the home addresses of the employees in the bargaining unit (R. Vol. II, pp. 44, 214, 219).

On June 21, 1965, the Company mailed an informational letter (General Counsel's Exhibit 15) to bargaining unit employees outlining the benefit plan changes proposed by the Company, and advising the employees of the current status of the negotiations (R. Vol. II, pp. 41-42).

There was no further request for employees' names and home addresses after the Union's letters dated April 5 and April 15, 1965 (General Counsel's Exhibits 3, 7) until March 8, 1966, almost one year later. Mr. Van Bourg, the Union's attorney, on that date wrote Mr. Diedrich, the Company's attorney, this time requesting that the Company furnish the Union the names and addresses of the employees "in the collective bargaining unit" (General Counsel's Exhibit 10). The letter states no reason for the request.

On March 16, 1966, Mr. Diedrich again wrote Mr. Van Bourg stating that the Company was unwilling to provide home addresses of employees, but would continue to furnish the Union with a seniority list in accordance with the terms of the collective bargaining agreement (General Counsel's Exhibit 11). Accordingly, by letter dated March 25, 1966 (Respondent's Exhibit 4), and mailed on or about that date, the Company sent to the Union copies of the seniority list as of January 15, 1966 (R. Vol. II, pp. 201-202). As the Board found, the delays occurred

in the delivery of this and other recent lists because the Company "had some difficulty while switching compilation of the lists to a computer" (R. Vol. I, p. 31).

On June 28, 1965, the Union filed a charge against the Company with the National Labor Relations Board (R. Vol. I, p. 3) on the ground that the Company "refuses to give the Union the list of the names and addresses of employees in the bargaining unit so that the Union can send out a mailing to counter Company propaganda" (R. Vol. I, p. 4). The Union, on May 5, 1966, filed an amended charge which asserted that the Company "has refused and continues to refuse to bargain collectively in good faith with the Union * * * in that it refuses to furnish the names and addresses of its employees to the aforementioned union" and asserted that such conduct violates sections 8(a)(1) and (5) of the National Labor Relations Act (R. Vol. I, p. 5).

Subsequently, the Board issued a complaint against the Company (R. Vol. I, pp. 6-9) charging the Company with refusing to bargain collectively with the Union by not making available to the Union the names and addresses of the employees in the unit represented by the Union (R. Vol. I, p. 8, pars. IX and X). The Company answered, admitting the Union's requests and the Company's refusal to furnish addresses, but denying that it refused to furnish the names of employees or that the Company refused to bargain with the Union (R. Vol. I, pp. 12-13).

A hearing was held before the trial examiner on July 7 and 8, 1966 (R. Vol. II). On November 2, 1966, the examiner issued his decision (R. Vol. I, pp. 15-18) in

which he found that the only reason that the Union had requested the addresses of Company employees was for the purpose of mailing out propaganda (*ibid.*, p. 16); that there was no issue presented in the case of the good faith of the Company (*ibid.*, pp. 16-17), and no showing that the Union sought the employees' addresses in connection with negotiations or the administration of collective bargaining agreements (*ibid.*, p. 18). For these reasons, he recommended that the complaint be dismissed.

Exceptions were filed by the General Counsel (R. Vol. I, pp. 19-21) and by the Union (R. Vol. I, pp. 22-26), and the Board, through a three-member panel, reviewed the examiner's decision and, one member dissenting, rejected his conclusion of law (R. Vol. I, pp. 28-39). The majority of the panel disagreed with the findings of the examiner with respect to the relevance of the requested information to the Union's bargaining and contract administration responsibilities and ruled that the allegations in the complaint (filed by the Board's General Counsel after the Union's charges had been filed) that a list of addresses was "relevant to collective bargaining" constituted a request on behalf of the Union for the addresses in connection with bargaining (R. Vol. I, p. 33). The majority adopted the findings of the trial examiner to the extent they were consistent with their determinations; in this respect, they did not reject the trial examiner's determination that there was no showing of bad faith on the part of the Company (R. Vol. I, p. 28). They concluded that:

"In this case the relevance of the unit employees' address list is apparent from a comparison of the Union's statutory duty of fair representation with the difficulties it faced in attempting to reach those

to whom it owed such duty. The Union's duty extends to non-union unit employees as well as to union members. Because of the relatively low union membership in the unit, the absence of a union-security clause in the collective-bargaining agreement, the residential dispersion of unit employees * * *, the apparent ineffectiveness of the steward system, the lack of adequate exposure of unit employees to union bulletin boards, and the inefficiency of handbilling efforts, the Union could not in any effective manner communicate with the beneficiaries of its statutory obligation. On the other hand, the possession of an address list would enable the Union to poll the unit employees as to their preferences and priorities in contract negotiations, their experience and recommendations with respect to the operation of the grievance-arbitration machinery, and their thoughts on the wisdom of striking over a particular issue" (R. Vol. I, pp. 34-35).

* * * * *

"The company appeals, which the Union desired to answer, sought to persuade employees that union representation was not needed by them to assure fair treatment and working conditions. Respondent [the Company] was of course privileged thus to express its view. But the Union was justified in inferring that Respondent's purpose was to weaken employee support of the Union and thereby to reduce, if not indeed to destroy, the Union's strength and effectiveness as a bargaining agent. The Union, therefore, in the discharge of its representative responsibilities to all employees in the unit whom it was statutorily required to serve, had a legitimate interest in responding to Respondent's arguments by communicating to the unit employees its side of the bargaining story

—to attempt to show, for example, why the employees needed the Union, how the Union had served them in the past and how it might in the future, why its contract administration actions and its bargaining proposals deserved their backing, and why it was in the employees' interest to provide membership and other support to their bargaining agent. But in order to be able effectually to counter Respondent's repeated statement of views, the Union needed first to know which employees were in the bargaining unit and where they could be reached. As the full information thus required lay exclusively in Respondent's possession, and was not otherwise available to the Union for reasons earlier stated, the Union had a right to demand this information from Respondent, and Respondent, we hold, had a correlative obligation to furnish it" (R. Vol. I, p. 36).

The dissenting member of the panel pointed out that

"The Union's request for the list of employees' names and addresses was based solely on its desire to 'counter the company propaganda.' The Union's stated reason thus negates any suggestion that the list was sought for bargaining purposes. My colleagues apparently rely on the allegation in the complaint to the effect that the list was requested 'because it was relevant to collective bargaining' as supplying the essential ingredient to a violation of the Act. But the General Counsel's *post hoc* rationalization scarcely suffices, in my opinion, to give the Union a reason it did not advance, and which was not before the Respondent when it refused the Union's request. Indeed, the Respondent does not claim that such a list is never required to be furnished, only that on the facts here it was not sought for bargaining purposes" (R. Vol. I, p. 39).

SPECIFICATION OF ERRORS

The National Labor Relations Board erred in requiring the Company to furnish home addresses of its employees to the Union as part of the Company's duty to bargain in good faith pursuant to section 8(a)(5) of the Labor Management Relations Act in that

- (1) Such addresses are not data necessary to negotiating or administering collective bargaining agreements;
 - (2) The Union did not request the home addresses for bargaining purposes but for the purpose of contacting the employees in order to strengthen the position of the Union;
 - (3) The decision of the Board interferes with the relative bargaining power of the employer and the union by requiring acts by the employer designed to strengthen the union in violation of national labor policy, as expressed in sections 8(d) and 8(a)(2) of the Labor Management Relations Act.
-

ARGUMENT

I. THE DUTY OF AN EMPLOYER TO BARGAIN IN GOOD FAITH DOES NOT REQUIRE IT TO SUPPLY THE UNION WITH THE HOME ADDRESSES OF ITS EMPLOYEES.

There is no independent duty on the part of an employer to supply information to a union. Such duty as the employer may have to supply information must arise under the provisions of the Labor Management Relations Act. In the case at bar, the National Labor Relations Board based its determination that the Company is required to supply addresses of its employees to the Union

upon section 8(a)(5) of the Act which requires the Company to bargain in good faith. In so doing, however, the Board has extended the duty to supply information beyond the requirements of good-faith bargaining.

Information which an employer must give the union is data which is required in order to permit an intelligent discussion of the issues between the negotiating parties. The Supreme Court noted, in *Labor Board v. Truitt Mfg. Co.* (1956) 351 U.S. 149, 152, that "Section 204(a)(1) of the Act admonishes both employers and employees to 'exert every reasonable effort to make and maintain agreements.' " This is what is meant by good-faith bargaining (*N.L.R.B. v. Western Wirebound Box Co.* (9 Cir. 1966) 356 F.2d 88, 92). It is on the basis of this obligation that employers are required to furnish information to unions which is "so necessary to effective negotiations that withholding it without good reason was inconsistent with the duty to 'exert every reasonable effort to make and maintain agreements' " (*Sylvania Electric Products, Inc. v. N.L.R.B.* (1 Cir. 1966) 358 F.2d 591, 593, certiorari denied (1967) 385 U.S. 852).

There are three types of information which an employer must supply to a union as a part of the employer's duty to bargain in good faith:

(1) Information which the employer must supply merely because the union requests it has been limited to data which have a direct bearing on wages, hours and working conditions—the mandatory subjects of bargaining—which are the "heart and core of the employer-employee relationship" (*International Woodworkers of America v. N.L.R.B.* (D.C. Cir. 1959) 263 F.2d 483, 485).

(2) Other data must be furnished to the union when the union has requested that the employer substantiate a claim which has been made during the course of negotiations (*Labor Board v. Truitt Mfg. Co.* (1956) 351 U.S. 149, 151-153; *N.L.R.B. v. Western Wirebound Box Co.* (9 Cir. 1966) 356 F.2d 88, 91-92). For example,

“If the employers claimed that they were unable to pay, the union had a right to be shown evidence of inability. But when the employers refused to pay, the union knew all it was entitled to know. In such a situation, further financial information from the employers’ records would be interesting and perhaps useful to the union, but not required; for such information cannot convert stubborn resolution into an excuse for failure to grant a wage increase or provide the basis for mutual bargaining concessions occasioned by a common understanding of financial plight” (*United Fire Proof Warehouse Co. v. N.L.R.B.* (10 Cir. 1966) 356 F.2d 494, 498).

(3) The employer also has the duty to furnish information which is relevant to the policing of the administration of the agreement through the grievance procedure (*N.L.R.B. v. Acme Industrial Co.* (1967) 385 U.S. 432, 436-437). There must, however, be a probability that the information is relevant to the union’s processing of a grievance. Where the information is not relevant to a matter which is subject to the grievance procedure,

“the data in question cannot be relevant to the Union’s present or potential policing of the contract through the processing of grievances, and failure to produce it does not constitute a violation of this aspect of the statutory duty to furnish information” (*Square D Company v. N.L.R.B.* (9 Cir. 1964) 332 F.2d 360, 365).

The employee address lists were not sought for any of the foregoing purposes but only as a means by which the Union could contact employees. Contact with the employees might conceivably be used by the Union to seek information which has a direct bearing on the working relationship between the employer and the employee. A list of home addresses cannot be viewed, for that reason alone, however, *as if it were* that sort of information. In the absence of evidence that it was requested for this purpose, and that it was necessary to enable the union to bargain intelligently, address lists may not be equated with the information which might be gained from the opportunity of contacting employees.³

In the case at bar, according to the frank admission of the Union itself, the information was sought only to "counter the company propaganda" (General Counsel's Exhibit 3). And there is no support whatever in the record for the statement by the Board that the lists might be used by the "Union to poll the unit employees as to their preferences and priorities in contract negotiations" (R. Vol. I, p. 35). No request for addresses for such a purpose was made to the Company and the Union did not even suggest at the hearing that it wanted the lists for such a purpose (see R. Vol. II, pp. 39-45). Indeed, as was pointed out by Board member Zagoria in his dissent,

³See *Fafnir Bearing Company v. N.L.R.B.* (2 Cir. 1966) 362 F.2d 716, 720-722, where, although the court in that case granted a union the right to contact employees for the purpose of gaining information, it did so only after a careful examination of the nature and relevance of the information (in that case time studies upon which wages were based) which was necessary for the union to intelligently process grievances and that there was no other way in which the information could be obtained.

“The Union’s request for the list of employees’ names and addresses was based solely on its desire to ‘counter the company propaganda.’ The Union’s stated reason thus negates any suggestion that the list was sought for bargaining purposes” (R. Vol. I, p. 39).

The Union never pretended that the addresses were desired for any purpose other than to “counter the company propaganda” (General Counsel’s Exhibits 3, 7 and 10; R. Vol. II, pp. 39-45). This was the only reason the Union ever indicated to the Company as the basis for its request (R. Vol. II, p. 229). The Union’s last request, on March 8, 1966, “repeating the request made to you on several previous occasions” (General Counsel’s Exhibit 10) certainly shed no new light on the basis for the Union’s request. Neither collective bargaining nor contract administration was ever mentioned to the Company by the Union in connection with its request. Nor were the requests made in the context of negotiations or of grievance administration.

Furthermore, even when a bargaining situation did arise by virtue of a contract opening on benefits during the term of the contract,⁴ the Union said nothing to the Company to indicate that it needed the home addresses for bargaining purposes (R. Vol. II, p. 44). The Union’s silence on this matter is particularly significant in light of the fact that the Union requested a good deal of other information from the Company in connection with these

⁴These negotiations were initiated by a Company proposal on May 12, 1965, to amend certain benefit plans (R. Vol. II, pp. 43-44), and there is no evidence that the May negotiations were even contemplated at the time of the Union’s requests in April (General Counsel’s Exhibits 3 and 7).

negotiations (R. Vol. II, p. 214). The Union made no further request for information in connection with those negotiations (R. Vol. II, p. 219).

The majority of the panel of the Board to which the case was assigned relies on the unsupported allegation made, not by the Union, but by the General Counsel in the complaint, that the list was "relevant to bargaining." But as previously shown (*supra*, p. 12) home addresses are not the type of information which the employer as part of its duty to bargain in good faith is required to supply merely because the union requests it and there is no support for the allegation in the complaint that the list was "relevant to collective bargaining" (R. Vol. I, p. 33). Moreover, to uphold the decision below on the ground that this allegation in the complaint constitutes a sufficient request for information would mean that an employer would be guilty of bad faith bargaining if he failed to provide the union with any information as long as that request was subsequently stamped, by the Board's General Counsel in the complaint, as "relevant to collective bargaining."

II. THE DECISION OF THE BOARD INTERFERES WITH THE RELATIVE BARGAINING POWER OF THE EMPLOYER AND THE UNION IN DIRECT CONTRAVENTION OF NATIONAL LABOR POLICY.

The decision of the National Labor Relations Board in the case at bar violates the fundamental principle of national labor policy which denies to the Board authority to interfere with the relative bargaining power of the employer and the union (*American Ship Bldg. v. Labor Board* (1965) 381 U.S. 300, 317-318; *Labor Board v. In-*

Insurance Agents (1960) 361 U.S. 477, 490). National labor policy, as expressed in section 8(d) of the Labor Management Relations Act, 61 Stat. 136, 142, 29 U.S.C. 158(d), prohibits the Board's intrusion into the substantive aspects of bargaining process; the Act does not authorize

“the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union” (*Labor Board v. Insurance Agents* (1960) 361 U.S. 477, 490).

Moreover, the broad prohibitions of section 8(a)(2) of the Labor Management Relations Act, 61 Stat. 136, 141, 29 U.S.C. 158(a)(2), make it unlawful for an employer to “contribute financial or other support” to any labor organization. The sole exception provided by the statute is permitting employees to confer with the employer during working hours without loss of pay (*ibid.*). An employer must refrain from assisting a union with material aid designed to make it easier for that union to strengthen its support among its employees.

The Board's decision to require the Company to furnish the home addresses directly contravenes the foregoing principles. The Board's purpose of requiring the Company to assist the Union to become a stronger representative is made explicit by the Board's statement that

“As bargaining agent, the Union had the statutory duty not only to represent all employees in the unit, but to seek to do so *effectively*. The Union's effectiveness as an employee representative was necessarily dependent on its bargaining strength, and this in turn, was dependent on continued employee adherence and support” (R. Vol. I, pp. 35-36; emphasis added).

As the Board pointed out, the Union could use the employees' home addresses to counter any of the Company's arguments

“to attempt to show, for example, why the employees needed the Union, how the Union had served them in the past and how it might in the future, why its contract administration actions and its bargaining proposals deserved their backing, and why it was in the employees' interest to provide membership and other support to their bargaining agent” (R. Vol. I, p. 36).

There is no question that the “Union's effectiveness as an employee representative was necessarily dependent upon its bargaining strength.” But the Act does not authorize the Board to require the employer to assist in making the union stronger. The Act requires the employer, as part of its duty to bargain in good faith, to “do what is reasonably possible to reach agreement,” which includes furnishing to the union, upon its request, information which is pertinent and necessary to the union's negotiations (*N.L.R.B. v. Western Wirebound Box Co.* (9 Cir. 1966) 356 F.2d 88, 92; see *supra*, pp. 12-13). Good faith bargaining does not, however, require that the employer hand the union a club with which to beat the company into submission. By obligating the company to strengthen the union the Board necessarily affects the very outcome of bargaining.

“[T]his amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced” (*Labor Board v. Insurance Agents* (1960) 361 U.S. 477, 498).

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should set aside the Board's order.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney for Petitioner.

(Appendices A and B Follow)

Appendices A and B



Appendix A

RELEVANT PROVISIONS OF THE LABOR MANAGEMENT RELATIONS ACT, AS AMENDED

SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SECTION 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SECTION 8. (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the

State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is re-employed by such employer.

SECTION 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such

purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

SECTION 10. (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to

the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

SECTION 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

Appendix B

LIST OF EXHIBITS

<u>General Counsel's Exhibits</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
1(a) through 1(h)	4	4	4
2	14	15	15
3	16	15	16
4	16	16	17
5	17	17	18
6	18	18	19
7	19	19	19
8	19	19	20
9	20	20	21
10	21	21	22
11	22	22	22
12	23	23	24
13	31	31	31
14	32	32	32
15	42	42	42
16	64	64	64
17	64	64	64
18(a) and 18(b)	159	162	163
19	170	174	174
<u>Respondent's Exhibits</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
1	36	36	36
2	74	(Withdrawn	212)
3	78	81	82
4	143	146	146
5	217	219	(Rejected 219)
6	233	233	236

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD OIL COMPANY OF CALIFORNIA,
WESTERN OPERATIONS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, RICHMOND,
CALIFORNIA, LOCAL 1-561,

Intervenor.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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United States Court of Appeals

FOR THE NINTH CIRCUIT

NO. 21,953

STANDARD OIL COMPANY OF CALIFORNIA,
WESTERN OPERATIONS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, RICHMOND,
CALIFORNIA, LOCAL 1-561,

Intervenor.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of the Standard Oil Company of California. Western Operations, Inc. (hereafter, "the Company") to review and set aside an order of the National Labor Relations Board issued against it on June 30, 1967, and on the Board's cross-petition for enforcement of

that order, pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). The Board's Decision and Order (R. 28-40, 15-18) ¹ are reported at 166 NLRB No. 45. The unfair labor practices herein having occurred at Richmond, California, where the Company operates an oil refinery complex, no jurisdictional issue is presented.

COUNTERSTATEMENT OF THE CASE

This case presents the single question whether the Company, by refusing to give its employees' certified bargaining representative a list of their names and addresses, violated Section 8(a)(5) and (1) of the Act. The facts underlying the Board's conclusion that the Company's refusal was unlawful, are set forth below.

A. The size and structure of the unit; the status and situation of the Union

The Company's oil refinery complex at Richmond, "among the largest in the world," covers four square miles on San Francisco Bay (R. 29; GCX 12, p. 1). Physically, it contains a maze of separate machinery units, called "plants," producing gasolines, oil, chemicals, and other materials, and ranging in size

¹ References designated "R" are to Volume I of the Record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony reproduced in Volume II of the Record. References designated "GCX" and "RX" are to exhibits of the General Counsel and petitioner (respondent before the Board), respectively. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following, to the supporting evidence.

from one-man operations to those tended by several hundred (R. 29; GCX 12, Tr. 127-128, 130). There, some 4600 persons are employed, 2600 by the Company and the others by related enterprises (R. 29; Tr. 33-34).

Since 1950, the Union ² has been the certified representative for collective bargaining of a unit of production and maintenance employees in the manufacturing and purchase and stores departments of the complex, including the San Pablo Tank Farm (R. 29; GCX 2, Article I). At the time of the hearing herein, the unit contained some 1500 of the Company's 2600 employees (R. 29; Tr. 33). Arriving at the refinery from the five or six county area in which they lived, mostly by automobile, the unit employees — like all others — entered the complex through four guarded gates (R. 29; Tr. 51, 60-62).

In recent years the unit has experienced considerable personnel turnover (R. 29; Tr. 33, 247). Thus, in 1965, the Company hired 155 new unit employees, and in the first half of 1966 (*i.e.*, prior to the hearing herein in July of that year) it had added 150, hiring "to maintain attrition at the rate of about 20 per month" (R. 29; Tr. 247-248). The Union did not receive the names of new employees at the time they were hired (Tr. 34, 247); and the collective bargaining agreement between the Company and the Union did not contain a union-shop clause. Rather, the contract provided for maintenance of membership, with an annual "escape" period of 30 days (R. 29; GCX 2, Art. 3). The contract required the Company to furnish seniority lists to the Union "at reasonable times," which by practice had come to mean twice a year (R. 31; GCX 2,

² Oil, Chemical and Atomic Workers International Union, Richmond, California, Local 1-561, AFL-CIO.

Art. 8, Sec. 2(e) at p. 10, Tr. 35, 68-70, 167-169, 198). These lists contained the names but not the home addresses of the unit employees (R. 31; Tr. 35, 38). Although the effective dates of the lists were January 15 and July 15, the lists were not actually made available to the Union until 1 to 6 months after their compilation (R. 31; Tr. 69-72, 199-200). The most recent lists had been longest delayed, because of difficulties the Company experienced in instituting computer-compilation of the lists (R. 31; Tr. 70-73, 199-202). The list effective July 15, 1965 — which gave the Union notice of the names of all persons hired since January 15 of that year — was not finally delivered until October or November (Tr. 35, 200, 247, 70-71). And the list showing the unit work force as of January 15, 1966 — which reflected the substantial number of new hires in the preceding six months — concededly was not mailed to the Union until at least some 2½ months later (Tr. 72, 200-202, 143-146). Even then the Union did not receive a complete roster of those whom it represented, for the list did not contain the large (200 or so) chemical division: the Company withheld that list because of a pending grievance involving the division (RX 4, Tr. 151, 208-209, 212-213).³

The Company conducts an orientation program for all new employees in which it explains their conditions of employment and makes known company policy on, *inter alia*, labor relations and unions (R. 29-30). At an early meeting, a Company representative makes a statement about unions, telling the new unit members that they will be represented by the Union and that a copy of the collective agreement is in the packet of material given each of them, and reading a statement to the effect that

³ Although the grievance was pending before the July 15, 1965, list was compiled, the chemical division was included in that list (Tr. 249-250). It was also included in a seniority list dated January 15, 1966, which was apparently furnished the Union at the hearing below in July 1966, at which time the grievance was still unresolved (Tr. 208-213, 249).

“[i]t is the legal right and privilege of employees of the Company to become members or refrain from becoming members,” that membership in a union “is not a condition of your employment with the Company,” that employees will receive no benefit nor suffer any detriment because of union membership, and explaining the maintenance-of-membership provision including its escape clause (R. 29-30; Tr. 221-223, 232-236, RX 6).⁴ In an “indoctrination” meeting later in the series,

⁴ The statement that is read provides in full (RX 6):

You have been told of the many values which accrue to Standard Oilers with increasing service with the Company and the advantages of steady employment in a growing industry where you have the opportunity of making your job a career. These things have been emphasized with the sincere belief that working conditions, wages, insurance against loss of income and the cooperative spirit of the employees here are not equalled elsewhere.

There are eight unions representing employees in the Refinery; seven craft and one production workers. It is the legal right and privilege of employees of the Company to become members or refrain from becoming members in such unions, as they may individually see fit. Such membership or non-membership does not affect their status as employees in any way.

Most of our agreements with these unions contain a “Maintenance of Membership” provision. These provisions do not require you to become a member of the union but do require that if you do become a member you must continue to maintain such membership for the term of the agreement so long as you remain an employee, by paying the periodic union dues and initiation fees uniformly required by the union, or until Escape Clause is used by employee.

Membership or non-membership in a union is not a condition of your employment with the Company. All employees will receive the same fair consideration for advancement opportunities and their privileges and benefits under established Company policies will in no way be affected by their membership or non-membership in a union. This is for your information if and when you may be urged to join or not to join any of the unions now representing employees in the Refinery.

the new employees are exposed more fully to the Company's philosophy by the oral reading to them of a company booklet entitled, "What We Believe" (R. 30; Tr. 32, 236-238, GCX 14). The booklet's section on labor relations asserts (GCX 14, p. 9):

We sincerely believe that good employee relations can be maintained and essential employee needs fulfilled through sound management administration without the necessity of employee organization and representations [sic] . We respect an employee's right to present his grievances, regardless of whether or not he is represented by a labor organization. Whenever a group of employees does desire organization and representation, we are willing to discuss with individual employees or with representatives of the group any pertinent matters affecting them. We are opposed to any provision requiring that an individual either join or refrain from joining any labor organization as a condition of employment. We willingly accept the obligation to bargain with any bona fide labor organization legally selected by the employees as their agent, and we intend to make every effort to maintain the best possible relationship with the elected representatives of a bargaining unit. In any agreement reached, however, we feel management must retain the rights and authorities necessary to direct and control the Company's operations effectively and efficiently.

Additionally, all new employees are provided a bulky booklet, "You and Your Company," which under the heading, "What about unions," states (R. 30; Tr. 31, 222, 236-237, GCX 13, pp. 31-32):

On the preceding pages of this booklet, we've tried to cover, in a general way, the many policies and programs developed by your Company's management to assure you fair treatment and to provide a rewarding career.

We sincerely believe that good employee relations can be maintained and essential employee needs fulfilled through sound management administration, without the necessity of union organization and representation. Your Company's wages, hours, and working conditions are among the best in industry, and its employee relations policies are designed to promote fair play and mutual respect. Policies like these are essential for 43,000 people to work together effectively. This also requires a great deal of cooperation and understanding, and a healthy regard for the rights of others.

As for union membership, it is your Company's belief that representation by an outside organization is not necessary in order for employees to enjoy fair treatment and good working conditions. However, this is something that all employees should decide for themselves after careful consideration of all the facts. While your Company recognizes your right to join a union, it does not believe

that you should be forced to join a union as a condition of employment and is opposed to all forms of compulsory unionism.

“Old” employees as well are given orientation and indoctrination during training programs (R. 31; Tr. 27). The Union is not a participant in any of these meetings (R. 31; Tr. 26).

**B. The Union’s attempts to communicate
with its constituents**

Union membership in the unit has varied, with approximately 50 percent of the unit employees belonging to the Union at the time of the hearing (R. 29; Tr. 46). Union access to unit employees, both members and non-members, has been provided to some extent by contract and to some extent by independent union efforts (R. 31). As shown above, pp. 3-4 the Company provided periodic seniority lists, which did not contain the employees’ home addresses. Pursuant to a contract provision allowing the Union to appoint “at least one steward for each unit in each section,” it had designated 72 stewards who were concentrated in areas with a high proportion of union members (R. 31; GCX 2, Art. 19, Sec. 1 at p. 46, Tr. 78-80).⁵ Moreover, many of the stewards were apparently inactive, having been appointed primarily to collect union dues during an interim between contracts when dues were not being checked-off by the Company (Tr. 82-86). Under a contract provision authorizing Union-maintained bulletin boards in Company-approved locations, there were

⁵ The contract permitted stewards’ presence in the refinery “before or after their regular shift,” but during his working hours a steward was authorized to leave his work only for the investigation or presentation of grievances (GCX 2, Art. 19, Sec. 3, 4 at pp. 46-47, and see Sec. 9 at pp. 47-48).

Union bulletin boards in regular locker rooms (R. 31; GCX 2, Art. 24 at p. 50, Tr. 47-48, 58-59, 123). They were not, however, an effective means of communication with the unit employees because other locker rooms were available in work areas (where there were no such boards) and because of the small amount of "change time" permitted employees who used the regular locker rooms (R. 31; Tr. 48-50, 59, 126-133, 153-161, 188-189).^{5a}

The Union had also sought to reach the unit employees by handbilling at the plant gates (R. 31; Tr. 52-54, 55).⁶ These efforts were restricted to two of the four gates because of automobile traffic hazards at the others (R. 31; Tr. 53). They were further limited in impact in that the Union had no means of ascertaining which of the many hundreds of persons using the gates were the employees it represented (R. 31-32; Tr. 54).

**C. The Union's requests for employee
addresses, the Company's denials,
and the Company's mailing to unit
employees during negotiations**

On April 5, 1965, the Union wrote to the Company requesting the home addresses of the employees (R. 32; Tr. 15-16, GCX 3). Referring to the Company's access to the employees through its compulsory orientation program in which it "talk[ed] about Unions without Union representatives being present," the Union stated its need "at least [to] counter the Company propaganda by mass mailing" (R. 32; GCX 3). On

^{5a} By contrast, Company bulletin boards are spread throughout the refinery (R. 31; Tr. 58, 132).

⁶ The Union's staff consists of one full-time person, plus a parttime office employee (Tr. 53).

April 14, the Union wrote again, and again referring to the Company's orientation meetings for employees "including employees performing work covered by our Agreement," the Union asserted that although the Company's approach was "a perfectly legal one, we believe that there is an issue of equal time" — it therefore asked for the opportunity to appear at the meetings "simply to give an orientation as to Union benefits . . ." (R. 32; Tr. 17-18, GCX 5).

The Company, on April 15, rejected the Union's initial request (R. 32; GCX 6). In its letter, the Company stated that its obligations, both "contractual and legal," were satisfied by providing seniority lists showing the name, classification and seniority date of all unit employees (*ibid.*). "[A]nd we are not willing," the letter continued, "to provide you with the home addresses of any of our employees" (GCX 6).⁷

Also on April 15, the Union sent the Company a second written request for addresses (R. 32; Tr. 19, GCX 7). Citing the Company's mailing to employees of the booklet "You and Your Company" (see *supra*, p. 7), the Union asked for "a complete mailing list of Standard Oil employees so that we may send them counter documentation and statements" (R. 32; GCX 7). On April 26, the Company rejected this request,

⁷ The Union's letter, by its counsel, was actually addressed to the Company's counsel who replied that he had sent it on to the Company as he "believe[d] the request for information is more appropriately handled by the Union representatives and Company representatives responsible for the administration of the collective bargaining agreement than by us as their lawyers" (GCX 4). A Company management representative testified to a Company policy "that lists contain[ing] the names and addresses, particularly addresses, of employees are not given to anyone" and that "we felt that inasmuch as this was a violation of that policy, we better check with our attorney . . . who told us that as far as he was concerned, there was no legal nor contractual obligation to make an exception in the case of a union request. and so we denied the request" (Tr. 225).

reiterating the position that neither law nor contract required its fulfillment (R. 32; GCX 8). The following day, the Union's request to appear at orientation meetings was likewise denied: stating its belief that employee participation or nonparticipation in union activities "is strictly a matter of individual choice," the Company averred that "if the Company were to arrange for such union presentations at employee orientation meetings, this might lead employees to believe that the Company is actively encouraging or sponsoring their participation in union activities. We wish to avoid any such inference." (R. 32; GCX 9).

During May 1965, Company and Union began bargaining about changes in certain benefit programs referred to in the contract (R. 32; Tr. 41-44). While negotiations were in progress, on June 21, the Company mailed to all unit employees a statement of its bargaining position and on the status of the negotiations together with copies of a document that it had read to the Union at a bargaining session (R. 32; Tr. 41-42, GCX 15). The statement announced that the subject benefits were already effective for all employees other than those represented by the Union, and informed the unit members that they, too, "would" receive the benefits as of June 1 "if" agreement were reached with their Union by the end of the month (*ibid.*).

A week after distribution of the Company's communication to the unit employees, the Union filed the original charge herein, alleging that the Company had violated the Act by, *inter alia*, "refus[ing] to give the Union a list of the names and addresses of employees in the bargaining unit so that the Union can even send out a mailing to counter Company propaganda" and "send[ing] mailings to employees concerning collective bargaining with the Union, but refus[ing] to furnish

the mailing address of said employees so that the Union can respond to the Company's position in the mailing" (GCX 1(a)).⁸

In February, 1966, the parties' collective agreement automatically renewed for another year (R. 32; Tr. 14-15). Early the next month, the Union made yet another written request for the employees' home addresses, *i.e.*, "a list of all the names and addresses of the employees in the collective bargaining unit" (R. 33; Tr. 21-22, GCX 10). As its representative elaborated in testimony, the Union needed the information because experience had shown that "if we were to have any kind of fair and equitable position at the bargaining table, that we were going to have to devise some means of communicating with the employees that we represent,"⁹ because of the Company's indoctrination

⁸ During the period of negotiations, which in July culminated in an agreement, the Union held membership meetings, one of which it opened to non-members as well (Tr. 54-55). Only two non-members attended (Tr. 55). To inform the non-members of the meeting and their invitation to it, the Union had had to rely on handbilling at the refinery gates, word-of-mouth transmission in the plants, and a telephone answering service which it maintained whereby an employee (or anyone else) could, by dialing a regular city number, obtain a Union newscast (Tr. 55-58). (Here again, in publicizing the Union telephone number so that employees could call, the Union was remitted to bulletin-board posting or handbilling (Tr. 58). The Company, by contrast, maintained a telephone news service in the refinery available to all employees from any telephone in the plants (Tr. 56-57).)

Asked at the hearing why the Union made no request for addresses during the May-July bargaining, its representative explained that it could see no point in an oral request at the bargaining table "because we had made three formal written requests and were in the process of preparing this charge, which was filed in June" (Tr. 44-45).

⁹ Particularly was this so in view of the Company's direct communication to the employees of its bargaining positions, in both 1964 and 1965 (Tr. 38, 39, *supra*, p. 11). But independently of that, the Union sought to be able to inform the employees confidentially of contemplated bargaining proposals (Tr. 162).

program for new employees who received no comparable introduction to the benefits of the Union, and because of the constant pressure "to organize our people" in the absence of a union-shop agreement (Tr. 38-40, 162).¹⁰ But the Company persevered in its denial, on the ground (as stated by its counsel) that the *contract* required no more than seniority lists (R. 33; GCX 11). Thereafter, the Union filed with the Board an amended charge of Company violations of Section 8(a)(1) and (5) of the Act by continuing refusal to furnish the Union the employees' names and addresses (GCX 1(c)). On May 6, 1966, the instant complaint issued, alleging that the Company had unlawfully refused and continued to refuse the statutory bargaining representative's request for the unit employees' names and addresses, "information relevant to collective bargaining and the administration of the current collective bargaining contract" (GCX 1(e), pp. 2-4).

THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts the Board (one member dissenting) found that the addresses of the unit employees were relevant to the Union's statutory responsibilities for bargaining and contract administration, that this information "lay exclusively in [the Company's] possession" and was not otherwise available to the Union, and that the Company had not offered a reasonable justification for withholding it (R. 34-36). Accordingly, the Board concluded that the Union had a legal right

¹⁰ As shown *supra* p. 5, the Company informed new employees of the annual 30-day "escape" period during which those who had joined the Union could leave it. Additionally, as authorized by the contract, the Company posted on its bulletin boards notices informing the employees generally of the "escape" period (GCX 2, Art. 3 at p. 3, Tr. 40, 161, 169).

to demand the address list, and the Company a correlative legal duty to meet the Union's request (R. 36, 37-38). The Company's refusal to furnish the information therefore violated Section 8(a)(5) and (1) of the Act (*ibid*).

To remedy the unfair labor practices found, the Board ordered the Company to cease and desist from that conduct and from interfering with its employees' statutory rights in any like or related manner (R. 38). Beyond this, the Company is required to provide the Union, upon request, a list of the home addresses of the unit employees, and to post the customary notices (R. 38-39, 40).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY DENYING THE UNION'S REQUEST FOR A LIST OF THE NAMES AND ADDRESSES OF THE EMPLOYEES WHOM IT REPRESENTED

A. The governing legal principles

"There can be no question," the Supreme Court recently observed, "of the general obligation of an employer to provide information that is needed by the bargaining representative [of his employees] for the proper performance of its duties." *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 435-436. Deriving as it does from a union's responsibilities as exclusive representative of all the unit employees, the employer's duty of disclosure is commensurate with those responsibilities. Thus, since it is "the well settled obligation of the bargaining agent not only to negotiate new contracts but also to police and administer existing agreements" (*Curtiss-Wright Corp. v. N.L.R.B.*, 347 F.2d 61, 68 (C.A. 3)), a union is entitled to data reasonably required for its effective performance

in both capacities. And because the “broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation” of all the unit employees¹¹ — members and nonmembers, opponents as well as adherents — the union likewise has an enforceable right to information in the employer’s possession which is relevant to the discharge of this responsibility.

In short, the sole criterion for determining the producibility of information is its relevance, or reasonable necessity, for the union’s proper performance of its representative role. This is true whatever the nature of the material sought, though the manner in which relevance is to be ascertained varies. Thus, information directly related to wages, hours, or other terms and conditions of employment (the mandatory subjects of bargaining), or to the union’s ability to administer an existing contract, is “presumptively relevant” to the union’s representative duties. Such information is, *prima facie*, required to be produced. See, e.g., *Boston Herald-Traveler Corp. v. N.L.R.B.*, 223 F.2d 58, 62 (C.A. 1); *Timken Roller Bearing Co. v. N.L.R.B.*, 325 F.2d 746 (C.A. 6), cert. denied, 376 U.S. 971; *Int’l Telephone and Telegraph Corp. v. N.L.R.B.*, 382 F.2d 366, 372-373 (C.A. 3). And see *Curtiss-Wright Corp.*, *supra*, 347 F.2d at 68-69. Where, however, the information requested is not so obviously pertinent to the subject

¹¹ *Humphrey v. Moore*, 375 U.S. 335, 342. See *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192; *Wallace Corp. v. N.L.R.B.*, 323 U.S. 248, 255; *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-338 (statutory obligation of an exclusive bargaining representative “to make an honest effort to serve the interests of all [unit] members”); *Vaca v. Sipes*, 386 U.S. 171; *Miranda Fuel Co.*, 140 NLRB 181, enforcement denied on grounds not here material 326 F.2d 172 (C.A. 2); *Hughes Tool Co.*, 147 NLRB 1573; *Local 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12 (C.A. 5), cert. denied, 389 U.S. 837.

matter of collective bargaining or to the bargaining process itself, so that relevance cannot be presumed, the union must demonstrate that the intelligence for which it has asked bears significantly upon its ability to carry out its statutory mandate. For example, information about an employer's financial situation is not on its face so related to collective bargaining or representation that it must always be produced upon request. But when an employer resists a union's wage demands on the ground that its financial situation does not permit them, relevance is demonstrated and the union's request for substantiating information must be met. *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149; *N.L.R.B. v. Western Wirebound Box Co.*, 356 F.2d 88 (C.A. 9); *Metlox Mfg. Co. v. N.L.R.B.*, 378 F.2d 728 (C.A. 9), cert. denied, 67 LRRM 2231. See *Int'l Telephone and Telegraph Corp. v. N.L.R.B.*, 382 F.2d 366, 370-371 (C.A. 3); *Puerto Rico Telephone Co. v. N.L.R.B.*, 359 F.2d 983, 986-987 (C.A. 1); *N.L.R.B. v. Celotex Corp.*, 364 F.2d 552, 553-554 (C.A. 5), cert. denied, 385 U.S. 987. So, too, detailed information about non-unit employees to which a union might not otherwise be entitled is required upon a showing that it is germane to the integrity of the unit represented. *Curtiss-Wright, supra*, 347 F.2d at 69-71. *N.L.R.B. v. Goodyear Aerospace Corp.*, ___ F.2d ___ (C.A. 6), 67 LRRM 2447, 2448. See *Int'l Telephone and Telegraph Corp., supra*, 382 F.2d at 371-372; *Hollywood Brands, Inc.*, 142 NLRB 304, 305 n. 2, enforced, 324 F.2d 956 (C.A. 5), reh. denied, 326 F.2d 400, cert. denied, 377 U.S. 923. Once established, whether by a presumption arising from the nature of the data sought or by particular facts of the situation, the union's reasonable necessity for the information fixes the employer's duty to produce; and his failure to grant the union's request is an unlawful refusal to bargain even though the employer's good faith is clear and no other refusal to bargain has occurred. *N.L.R.B. v. Woolworth Co.*, 352 U.S.

938, rev'g *per curiam* 235 F.2d 319 (C.A. 9); *N.L.R.B. v. Feed and Supply Center, Inc.*, 294 F.2d 650, 652-653 (C.A. 9); *Timken Roller Bearing Co., supra*, 325 F.2d at 754; *Fafnir Bearing Co. v. N.L.R.B.*, 362 F.2d 716, 721 (C.A. 2); *Curtiss-Wright Corp., supra*, 347 F.2d at 67-68; *Taylor Forge and Pipe Works v. N.L.R.B.*, 234 F.2d 227, 231 (C.A. 7), cert. denied, 352 U.S. 942; *J. I. Case Co. v. N.L.R.B.*, 253 F.2d 149, 152-156 (C.A. 7); *Puerto Rico Telephone Co., supra*, 359 F.2d at 986.

**B. The employee address list is
relevant and necessary**

The employee address list here repeatedly requested and refused does not directly relate to a particular subject of bargaining, nor to a specific dispute arising during the terms of and under a contract. Its significance to the Union, and thereby its relationship to the bargaining process, is both more general and more profound. It is the Union's status as employee representative that gives relevance to the employee information sought, for the Union must be able to carry on the dialogue on which representation depends if it is to meet its statutory responsibility fairly to represent the employees. And as shown in the Counterstatement, the Union, although the certified representative of the 1500 unit employees, was as a practical matter unable to communicate with them. Their homes were scattered through a geographic area encompassing 5 or 6 counties; they entered and left the refinery with thousands of others from whom they were indistinguishable as all traversed (chiefly by automobile) the same few gates; even their identities were disclosed to the Union only semiannually at best. The employees were scarcely approachable away from the work place by anyone without an address list (*supra*, pp. 3-4). While those employees who chose to join the Union presumably thereby made their addresses known,

the collective agreement between Company and Union did not require union membership and membership in fact hovered around 50% of the unit work force (*supra*, pp. 3, 3). (The Union's representative duties of course ran to all.) Within the four square miles of the refinery with its many scattered work areas, neither the limited exposure afforded by union bulletin boards in the separate locker rooms nor the Union's steward system enabled effective (much less confidential) communication between the Union and its constituents (*supra*, pp. 8-9). Experience had taught the Union that it could not reach those for whom it spoke by the means at hand alone. Indeed, when the Union attempted to hold a meeting of all the employees, non-union as well as union, during negotiations in 1965, restricted as it was in even getting its invitation to the non-members, only two such individuals attended (*supra*, p. 12, n. 8).

Thus stultified in informing the employees about bargaining proposals it was contemplating submitting to the Company or about "the position of the union versus the position of the company" at the bargaining table (Tr. 162, 38-40), and equally without means of ascertaining the employees' views on any of these matters, the Union was further faced with the fact that the Company could and did express its sentiments on union matters directly to the unit members. Repeatedly and forcefully, the Company apprised all new employees of its view that union representation was unnecessary, and did so both orally and in writing in statements that sought to persuade the new workers to that view (*supra*, pp. 4 - 8). More than 300 new employees were added to the unit during the period in which the Union made its requests for a name-and-address list (*supra*, p. 3). Yet the Union whose representative mandate required it to speak for these employees had no means of reaching them to introduce itself and to explain the meaning of representation and its

consequences in terms of employee rights, restrictions and privileges. Moreover, during the negotiations in process in May and June of 1965, the Company used just such a mailing list as the Union had previously requested to inform the unit employees individually of the Company's bargaining position and of the status of the negotiations as seen from its perspective (*supra*, p. 11).

On these facts, we submit, the Company's legal duty to supply the requested employee address list is established. The Union's reasonable necessity for such a list "is apparent," as the Board found, "from a comparison of the Union's statutory duty of fair representation with the difficulties it faced in attempting to reach those to whom it owed such duty" (R. 34). Indeed, if there could be any question that relevance is thus established, the Company itself gave the answer by its conduct in communicating directly with the unit employees on the subject of representation while at the same time denying the Union's repeated requests for a list to enable it to do likewise.

This is, of course, not to say that an employer must always facilitate communication between his employees and their union. Rather, it is to recognize the principle, previously applied in this and other contexts, that where union access to the employees is necessary for full vindication of their statutory rights and requires the action or assent of their employer, then that action or assent is compelled by the Act. Thus, where in administering a collective agreement a union needed time-study data that could be acquired only if its own expert were admitted to production areas of the plant to make his own studies on the employees as they performed their regular tasks, the employer was obligated to permit such entry and access. *Fafnir Bearing Co. v. N.L.R.B.*, 362 F.2d 716 (C.A. 2). And where as a practical matter employees were

unavailable for discussions with their certified representative except on the ships on which they were employed, the Act required their employers to permit union officials to board the ships both for the processing of grievances (*Richfield Oil Corp. v. N.L.R.B.*, 143 F.2d 860 (C.A. 9); *N.L.R.B. v. Cities Service Oil Co.*, 122 F.2d 149 (C.A. 2)) and "for other mutual aid and protection of the employees represented" including collection of dues and distribution of union literature (*Richfield Oil Corp.*, *supra*). Similarly even in the situation where, the employees being unrepresented, a stranger union is engaged in organizational efforts among employees whose free time as well as work time is spent on the employer's premises "so that union organization must proceed upon the employer's premises or be seriously handicapped" (*Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 799), the employer must permit union personnel reasonable access to his employees on his property. *N.L.R.B. v. Lake Superior Lumber Co.*, 167 F.2d 147, 151-2 (C.A. 6) (practical difficulties for union in attempting contact otherwise than as permitted by Board order); *N.L.R.B. v. S & H Grossinger's Inc.*, 372 F.2d 26, 29-30 (C.A. 2) (apart from solicitation on employer's premises employees "cannot be reached by any means practically available to union organizers"); cf., *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, 111-114.¹² On the same principle, an employer

¹² As the Supreme Court stated in *Babcock & Wilcox*, *supra*, 351 U.S. at 113, "The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property." The approval in *Babcock & Wilcox* (351 U.S. at 111) of the *Lake Superior Lumber Co.* case, *supra*, as well as similar Supreme Court statements in *Republic Aviation*, *supra*, 324 U.S. at 799, have rendered invalid the inhibitions in *Richfield Oil* and *Cities Service Oil*, *supra*, on organizational activities by the certified representative within the employer premises there opened to the unions.

has been required to accede to the request of his employees' union for a list of the employees' addresses. In *Kenai Packers*, 144 NLRB 1122, the Seattle-based union had requested, *inter alia*, a list of the names and addresses of current employees in the unit of crew members on the employer's salmon vessels operating out of Kenai, Alaska, some 1500 miles distant from Seattle. *Id.* at 1124-1125, 1128. The data sought could have been germane to dues collection, enforcement of contract wages, union policing of compliance with other benefit provisions of the contract and with contractually-established employment preferences. *Id.* at 1128. "Since [the union's] limited request, therefore, clearly called for data fundamental to the viability of the parties' contractual relationship," the Board found the requested data necessary "to provide some basis for the union's 'intelligent representation'" of the employees, and held the employer's refusal to furnish it a violation of Section 8(a)(5) and (1) of the Act. *Id.* at 1128, 1130.¹³ So here, "[a]s the full information [which the Union required properly to represent the employees] lay exclusively in [the Company's] possession, and was not otherwise available to the Union for reasons earlier stated, the Union had a right to demand this information from [the Company]," and the Company, the Board held, "had a correlative obligation to furnish it" (R. 36).

¹³ Compare *McCulloch Corp.*, 132 NLRB 201, where the union demanded the addresses of all unit employees in connection with certain bargaining issues. The addresses were not "essential to bargaining on [these] or any other issue[s]" (as the employer had declared in refusing to give the addresses), and the Board found that no "reasonable ground for making the request and necessity for the information" had been shown. *Id.* at 209-210. No question of necessity for communication with the employees was raised, and apparently none could have been since both union and employer distributed publications to the employees during their year of negotiations. *Id.* at 205.

The Company says that this result is wrong because the Union in making its initial request for names and addresses stated that it wished to "counter the company propaganda," a purpose which (the Company argues) is unrelated to the Union's duties as bargaining representative. We show below that the purposes for which the Union needed and sought the data were not so limited; that the quoted objective would suffice to oblige production by the Company even had it stood alone; and that the Company's refusal to furnish the list was in any event based not on lack of relevancy but rather on asserted Company policy that "the names and addresses, particularly addresses" of its employees are not given to "anyone."

**C. The Company's reasons for refusing
to give the Union the employees'
addresses are without merit.**

As shown in the Counterstatement, when the Union made its first and second requests for the list in April 1965, it referred to the Company's orientation program in which management repeatedly (and *ex parte*) discussed unions, urged the Company's view that unions were not needed by Company employees, and emphasized that employees not only were not required to join any union but — if they did so — could avail themselves of the "Escape Clause". The Union was concerned that the employees hear also the Union's side of the story. Hence, the Union asked for the name-and-address list to enable it to "counter the company propaganda" with "counter documentation and statements" (*supra*, pp. 9-10). Both requests were rejected outright, the Company asserting that its full "contractual and legal" duty was met by provision of the periodic seniority lists on which the Company showed names, classifications, and seniority dates of the employees

(*supra*, pp. 10, 11). Matters did not end there. During the mid-term negotiations that shortly ensued, the Company, using the very list that the Union had requested, mailed to each unit employee information on the Company's position in the negotiations as well as its views on the status of the negotiations, which included the assertion that the employees would enjoy new benefits retroactively if their Union agreed by a designated date, but not otherwise (*supra*, p. 11). And so, believing that a renewed request for the list would be futile, the Union filed an unfair labor practice charge. There, in challenging the Company's refusal to supply it the unit employees' names and addresses, the Union again specified its need to send mailings to "counter Company propaganda" and, additionally, its need to respond to the Company's mailing "concerning collective bargaining with the Union" (*supra*, pp. 11-12 and n. 8). Nevertheless, when the Union subsequently made yet another written request for the list, the Company again declined, this time stating only (and irrelevantly) that the contract did not require its production.

Thus, it can hardly be questioned that the relevance of the requested list to the Union's ability to carry out its duties as certified representative was put to the Company prior to the commencement of these proceedings, or to the Board for decision. The charges and the complaint herein alleged that the Company's continuing refusal to furnish the requested information was unlawful in that the list was information relevant to the Union's proper performance of its collective bargaining responsibilities. And at the hearing the Union detailed the circumstances that had led to its requests: it referred again to the Company's interventions with the employees during negotiations which meant that "if we [the Union] were to have any kind of fair and equitable position at the bargaining table, that we were going to have to devise some means of communicating with the employees that we represent" (Tr. 38-39); it pointed out that because of the many situational impediments to its reaching its constituents it had no means of informing them in confidence of contemplated bargaining proposals (Tr. 162); it spoke again of the Company's orientation program

and, therefore, the Union's "absolute necess[ity]" to be able to communicate with the new employees "in order to inform them of the existing collective bargaining agreement, what they are entitled to, so forth" ¹⁴; and it cited the "constant pressure" upon it to organize, stemming from the absence of a union-shop clause and the other factors previously set forth (Tr. 40).¹⁵

¹⁴ As previously noted, the Company hired some 300 new unit employees between the time of the Union's first and its third request for the names and addresses (*supra*, p. 18).

¹⁵ In its briefs both to the Trial Examiner and to the Board the Company argued that nothing in the situation or the Union's words met the legal test for producibility of information, which the Company contended requires only those data relevant to mandatory subjects of bargaining. Before the Trial Examiner, for example, the Company maintained that even if it were shown that the Union needed employee home addresses in order to contact them to obtain job-related information for the investigation and processing of grievances, "Section 8(a)(5) does not obligate an employer to furnish this information" because it has "no apparent connection with wages, hours and working conditions [and] the burden is on the union to clearly demonstrate that the information is relevant to a subject of mandatory bargaining . . ." And before the Board the Company asserted that none of the Union reasons set forth in the text *supra* "has any direct bearing on the Union's ability to bargain intelligently or to evaluate and process grievances," and contended that "the record evidence (such as it is) is that the Union says it needs this 'information' from the employer — not to *learn* what it must know to bargain intelligently — but to *tell* employees what the Union already knows and believes." Thus to limit the dialogue between constituent and representative to one-way communication is, we believe, an erroneous view of the law.

In any event, the Union's statement that it intended to use the address list to counter Company propaganda against it, far from negating the Company's duty to produce (as the Company contends), demonstrates why in the situation here the Union was entitled to what it requested. For the Union was not a stranger to the scene, an outsider trying to convince the employees that their interests and strength lay in organization and union representation. That choice had been made, and the Union designated the employees' bargaining agent. Consequently, as their sole spokesman in all matters pertaining to the terms and conditions of their employment, the Union was legally obligated to speak for all and to seek to do so effectively. Manifestly, its effectiveness was dependent upon (though not guaranteed by) mutual understanding between the representative and those represented, its strength upon their support. But here the Company was endeavoring to persuade the Union's constituents that representation was unnecessary — and in the case of the several hundred new employees hired during this period, the Company's position was impressed upon them months before the Union would receive even their names.¹⁶ As the Board pointed out, while the Company was "privileged thus to express its view . . . the Union was justified in inferring that [the Company's] purpose was to weaken employee support of the Union and thereby to reduce, if not indeed to destroy, the Union's strength and effectiveness as a bargaining agent" (R. 36). Thus the Union "had a legitimate interest" (*ibid.*) in responding to the Company's assertions by presenting its perspective on the matter —

¹⁶ Because of the Company's difficulties with its new computer, to which it had transferred the compilation of the seniority lists, these lists — which provided the Union's first notification of new hires and were prepared only semiannually at best — were delayed for periods up to several months beyond their normal delivery date (*supra*, p. 4).

in the Board's words, "[by] attempt[ing] to show, for example, why the employees needed the Union, how the Union had served them in the past and how it might in the future, why its contract administration actions and its bargaining proposals deserved their backing, and why it was in the employees' interest to provide membership and other support to their bargaining agent" (*ibid.*). The Company does not suggest any legitimate interest it may have in keeping the employees whom it exhorts insulated from the countervailing arguments of their statutory representative, and we know of none. Indeed, it is now a standard rule in Board election proceedings, following *Excelsior Underwear, Inc.*, 156 NLRB 1236, that prior to an election an employer must furnish to a Board agent a list of the names and addresses of the employees eligible to vote, which list is then made available to all parties. A major purpose of the rule, which has been held valid in virtually all litigation passing on the question,¹⁷ is "to make certain that employees are able to exercise an informed and reasoned choice after hearing all sides of the question concerning the desirability of union representation" (*N.L.R.B. v. Rohlen*, 385 F. 2d 52, 55 (C.A. 7)). If employees are entitled to hear from all sides before choosing whether to be represented, surely they are entitled to no less when, that choice having been

¹⁷ *N.L.R.B. v. Hanes Hosiery Division, Hanes Corp.*, 384 F.2d 188 (C.A. 4), *pet. for cert. pending*, No. 982, this term; *N.L.R.B. v. Rohlen*, 385 F.2d 52 (C.A. 7); *N.L.R.B. v. British Auto Parts, Inc.*, 266 F. Supp. 368 (C.D. Cal.), *appeal pending* (No. 21883, C.A. 9); *N.L.R.B. v. Tele-dyne, Inc.*, 66 LRRM 2408, 2410-2411 (N.D. Cal.), *appeal pending* (No. 22354, C.A. 9); *N.L.R.B. v. Wyman-Gordon Co.*, 270 F. Supp. 280 (D. Mass.), *appeal pending* (No. 7000, C.A. 1); *N.L.R.B. v. Wolverine Industries Div., Mid-States Metal Products, Inc.*, 64 LRRM 2060, 2187, 2189 (E.D. Mich.); *Swift & Co. v. Solien*, 274 F. Supp. 953 (E.D. Mo.); *N.L.R.B. v. Beech-Nut Life Savers, Inc.*, 274 F. Supp. 432 (S.D. N.Y.). See also *N.L.R.B. v. Q-T Shoe Co.*, 67 LRRM 2356 (D. N.J.).

made, their employer nonetheless avails himself of his special access to them to continue to campaign against representation (and, for that matter, for his position on matters upon which the employer and union are bargaining).

The Company's true position here, we submit, was revealed by management testimony as to its reaction to the Union's request. It is Company policy, its witness averred, "that lists contain[ing] the names and addresses, particularly addresses, of employees are not given to anyone," a policy that would be violated by providing such a list to the Union (Tr. 225). In short, the Company would treat a certified union as a stranger to the industrial scene rather than a legitimate participant. This approach is seen also in the wholly frivolous contention that had the Company provided the Union the addresses sought, it would thereby have violated Section 8(a)(2) of the Act. In the Company's curious construction of that section, saving only that employees may be permitted to confer with the employer during working hours without loss of pay, an employer must refrain from actions that could be seen as "assisting a union [including an incumbent union] with material aid designed to make it easier for that union to strengthen its support among its employees" (Br., p. 17). Thus would disappear much of the duty imposed by Sections 8(d) and 8(a)(5): agreement to check-off union dues, for example, as the Company here has agreed to do, would be lawless, as would agreement to utilize a union hiring hall — a mandatory subject of bargaining, as this Court has held. See *N.L.R.B. v. Tom Joyce Floors, Inc.*, 353 F.2d 768, 771 (C.A. 9); accord, *N.L.R.B. v. Houston Chapter, Associated General Contractors*, 349 F.2d 449 (C.A. 5), cert. denied, 382 U.S. 1026; and cf., *Local 357, Int'l Bhd of Teamsters v. N.L.R.B.*, 365 U.S. 667. Moreover, as we have seen, in proper circumstances an employer must admit union personnel to his

premises not only to facilitate performance of the union's representative functions but even to facilitate purely organizational activities. ¹⁸ See *supra*, pp. 19-20. In sum, the Company cannot relieve itself of the duty to supply relevant requested information by showing that the information will be helpful to the Union.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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¹⁸ It is well settled that an employer does not violate Section 8(a)(2) by cooperating with a union in its efforts to communicate with his employees, provided that equal opportunities to communicate are not denied opposing forces and that the employer does not engage in other acts of assistance constituting interference with his employees' free choice. See *N.L.R.B. v. Majestic Weaving Co.*, 355 F.2d 854, 856-857, 858-859 (C.A. 2); *Kimbrell v. N.L.R.B.*, 290 F.2d 799, 802 (C.A. 4); *Perry Coal Co. v. N.L.R.B.*, 284 F.2d 910, 912, 913-914 (C.A. 7); *Morganton Full Fashioned Hosiery Co.*, 107 NLRB 1534-1535.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered Brief conforms to all requirements.

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For the Ninth Circuit

STANDARD OIL COMPANY OF CALIFORNIA, WESTERN OPERATIONS, INC., VS. NATIONAL LABOR RELATIONS BOARD, 	} <i>Petitioner,</i> <i>Respondent.</i>
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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

PRELIMINARY STATEMENT

There is little dispute as to the basic legal principles which govern this case. The Board states, "[w]here * * * information requested [by a union from an employer] is not so obviously pertinent to the subject matter of collective bargaining or to the bargaining process itself, so that relevance can be presumed, the union must demonstrate that the intelligence for which it has asked" relates to collective bargaining (Resp.Br., pp. 15-16). And the Board freely concedes that the employee address list here requested "does not directly relate to a particular subject of bargaining, nor to a specific dispute arising during the terms of and under a contract" (Resp.Br., p. 17).

The undisputed evidence shows (1) that at no time did the Union indicate to the employer that the list of home addresses was necessary to enable it to bargain intelligently or to administer the collective bargaining agreement and (2) that the Union's sole stated purpose for

requesting the information was to enable it to make a mass mailing to employees to counter what it believed to be employer "propaganda." The Board, however, seeks to establish an erroneous inference that the Union requested the address list for collective bargaining purposes. Such an inference is contrary to the record, the findings of the trial examiner, and the findings of the panel of the Board itself.

The Board also attempts to justify its decision on the grounds that the address list would facilitate union "access" to employees and would contribute to the "strength" and "effectiveness" of the Union. Such post hoc rationalizations are plainly inadequate when the undisputed evidence shows that the list was not requested for collective bargaining purposes. Moreover, the rationalizations now offered by the Board are legally insufficient to support a finding of an employer violation of the duty to bargain in good faith under section 8(a)(5). The duty to bargain in good faith with a union does not impose upon an employer the obligation to do acts the purpose of which is merely to strengthen the union.

I. THE UNION DID NOT REQUEST THE ADDRESS LIST FOR BARGAINING PURPOSES.

In its decision below, the panel of the Board erroneously held (R. Vol. I, p. 33) that, so long as the General Counsel's complaint contained an allegation that the information was relevant to collective bargaining, a violation of the duty to bargain in good faith could be found even though the Union did not tell the employer that the

information was requested for collective bargaining purposes (see discussion in our opening brief at p. 16). Significantly, the Board's brief abandons this position. Instead, the Board now attempts to raise an inference that the Union actually did request the address list in connection with collective bargaining (see Resp.Br., pp. 22-23). The trial examiner, however, expressly found that "[t]here is not a shred of evidence that the Company in this case was presented with a request for information which the Union indicated it needed for bargaining purposes" (R. Vol. I, p. 18). And, the panel of the Board did not disagree with this finding (*ibid.*, pp. 28, 33).

In addition, the Board's effort is entirely without support in the record. The Union here was frank to state the purpose of its requests for the list of employee home addresses, and it did not suggest, prior to the hearing, that the list was requested for any purpose connected with collective bargaining. The uncontradicted evidence shows that the Union's requests were made solely to enable the Union to "counter the company propaganda" (General Counsel's Exh. 3) and to send employees "counter documentation and statements" (General Counsel's Exh. 7; and see discussion in our opening brief at pp. 14-16). And, when a bargaining situation did arise, the Union neither said nor did anything to indicate that it needed the home addresses for bargaining purposes (see discussion in our opening brief at pp. 15-16). The suggestion (Resp.Br., p. 12, *ftn.* 8) that no request was made because it would have been futile finds no support either in the findings of the trial examiner or in the opinion of the panel of the Board (see R. Vol. I, pp. 16-18; 32-33).

The Board's assertion (Resp.Br., p. 23) that "[t]he charges" filed by the Union specified the relevancy of the list is without foundation. The first charge (R. Vol. I, pp. 3-4) made no reference whatever to any alleged need for the list in order to bargain more effectively.¹ The amended charge (filed one day before the complaint) added an allegation that failure to supply the list was a refusal to bargain in good faith (R. Vol. I, p. 5). The first and only assertion that the list "constitutes information relevant to collective bargaining and the administration of the current collective bargaining contract" is contained in the General Counsel's complaint (R. Vol. I, p. 8). This conclusory allegation sheds no light on how home addresses were relevant.

It is therefore undisputed that the Company was never asked by the Union for bargaining information; it was asked only for an employee mailing list so that the Union could send out a mass mailing to the employees advertising its own views. These facts leave no room for doubt that the trial examiner correctly recommended that the complaint, based solely on alleged refusal to bargain in good faith, should be dismissed.

The Board also attempts to establish a relation between the request and collective bargaining on the basis of testimony brought forth at the hearing. That testimony is summarized in the Board's brief (at pp. 23-24) and, in effect, recites the Union's asserted need to "com-

¹The only mention of bargaining in the first charge, which was based solely on the desire of the Union to "counter Company propaganda," was the assertion that the list was needed "so that the Union can respond to the Company's position in the mailing" (R. Vol. I, p. 4).

municate" its views to the employees and to "strengthen" itself through continued organizational efforts. As is shown below (infra, pp. 5-10), these asserted purposes are legally insufficient.

II. THE BOARD'S POST HOC ATTEMPTS TO ESTABLISH RELEVANCY OF THE LIST TO COLLECTIVE BARGAINING ARE LEGALLY INSUFFICIENT.

As demonstrated above and in our opening brief (pp. 11-16), the undisputed evidence shows that the Union never requested the address list in connection with collective bargaining or for collective bargaining purposes.

The Board asserts (Resp.Br., pp. 17-27) that the list was in fact relevant to collective bargaining for reasons which were not advanced by the Union at the time it requested the list. We respectfully submit that an employer's obligation to bargain in good faith can be measured only by the request and stated reasons presented to him—not by the post hoc rationalizations of the Board. Moreover, the rationalizations offered by the Board are legally insufficient.

A. Relevancy to collective bargaining is not established by the claim that requested information would facilitate union "access" to employees.

As pointed out in our opening brief (p. 12), information which must be supplied by an employer in the discharge of his duty to bargain in good faith is that information in the employer's possession which is needed by the union to enable it to intelligently discuss the issues between the negotiating parties or to determine whether

the collective bargaining agreement has been violated. It is plain that an address list does not relate directly to collective bargaining. Indeed, the Board frankly admits that the list “does not directly relate to a particular subject of bargaining, nor to a specific dispute arising during the terms of and under a contract” (Resp.Br., p. 17). In such a case, as the Board acknowledges, “the union must demonstrate that the intelligence for which it has asked” relates to bargaining (Resp.Br., p. 16).

In spite of these admissions, the Board asserts (*ibid.*, p. 19) that the address list would facilitate union “access” to employees and that *for that reason* the Company was obligated to supply it to the Union. The Board thus erroneously seeks to expand the duty to bargain in good faith under section 8(a)(5). Instead of requiring an employer to supply information which would enable a union *to bargain* intelligently, the Board would create a broad new rule that an employer must supply any and all information which may be generally helpful to a union. There is, however, no basis in law for the Board’s suggested new rule.

The Union must, as the Board admits (*ibid.*, p. 16), establish the relevancy of information requested to the bargaining process. This requirement is clear in the two cases, relied upon by the Board, which enforce an employer’s duty to bargain in good faith. In *Fafnir Bearing Company v. N. L. R. B.* (1966) 362 F.2d 716, 718-721 (Resp.Br., p. 19), the union established that time study data was necessary for intelligent processing of grievances and the court therefore allowed a union expert to make such studies within the employer’s plant. Similarly,

in *Kenai Packers* (1963) 144 NLRB 1122 (Resp.Br., p. 21), the contract contained a union shop provision (144 NLRB 1124-1125) and therefore a list of employee names and addresses obviously was necessary in order to assure that the employer was abiding by the contract (144 NLRB 1128).²

The error of the Board's present position is shown by its reliance upon cases which enforce statutory provisions other than the employer's duty to bargain in good faith under section 8(a)(5). The Board attempts to support its main argument with cases (Resp.Br., p. 20)—none of which was cited in the opinion below—which deal solely with protection of employee organizational rights under section 7 of the Act.³ Not one deals with the employer's duty to bargain in good faith under section 8(a)(5). Similarly, *Excelsior Underwear Inc.* (1966) 156 NLRB 1236, 1246 (relied upon generally by the Board at pp. 26-27), deals with the Board's mandate to assure "the

²The Board erroneously seeks (Resp.Br., p. 21, ftn. 13) to distinguish its decision in *McCulloch Corporation* (1961) 132 NLRB 201. In that case, the Board correctly noted that an address list was "not essential to bargaining" and concluded that there is

"* * * no obligation on the part of an employer to release information to the bargaining union merely because it is available and is requested. A reasonable ground for making the request and necessity for the information must be shown" (132 NLRB 209-210).

³Those cases are: *Labor Board v. Babcock & Wilcox Co.* (1956) 351 U.S. 105; *Republic Aviation Corp. v. Board* (1945) 324 U.S. 793; *N. L. R. B. v. S & H Grossinger's Inc.* (2 Cir. 1967) 372 F.2d 26; *National Labor Rel. Bd. v. Lake Superior Lumber Corp.* (6 Cir. 1948) 167 F.2d 147; *Richfield Oil Corp. v. National Labor Relations Board* (9 Cir. 1944) 143 F.2d 860; and *National Labor R. Board v. Cities Service Oil Co.* (2 Cir. 1941) 122 F.2d 149.

fair and free choice of bargaining representative by employees" in Board-conducted representation elections under section 9 of the Act. In that decision, the Board itself contrasted the issue before it in an election case "with the substantially different issue of whether the employers' conduct violated" section 8 of the Act (156 NLRB 1246).

The critical fact remains that the Union at no time requested the employee address list for collective bargaining purposes. In the absence of such a request, the Company plainly had no duty to supply the list.

B. An employer has no obligation to supply information in order to increase a union's "strength" and its "effectiveness."

The Board asserts that "the quoted objective [to 'counter the company propaganda'] would suffice * * * even had it stood alone" (Resp.Br., p. 22). The basis for this assertion is the statement that the list would assist the Union in gaining "strength" and "effectiveness" (Resp.Br., pp. 25-26). However, as pointed out in our opening brief (pp. 16-18), such a rationalization can not justify a holding that an employer "refused to bargain in good faith" by refusing to provide information for this purpose alone.

It is obvious that certain information which an employer could supply to a union might be helpful to the union. However, a union is not entitled to that information simply *because* it may be helpful. Rather, as the Board acknowledges (Resp.Br., pp. 14-17), a union must establish the relevancy of the information to collective

bargaining. In the absence of evidence that the particular information was sought in order to enable a union to *bargain* intelligently, there can be no violation of section 8(a)(5). The Board does not show that there is any such evidence in this case, and there is none.

It is perhaps because of this absence of evidence that the Board seeks to shift the burden to the employer to show a "legitimate interest" in withholding information which would contribute to the "strength" and "effectiveness" of a union (see Resp.Br., pp. 13, 26). Such a shift in the applicable burden of proof is plainly contrary to the governing legal principles which are recognized by the Board itself (Resp.Br., pp. 14-17). In this regard, the Board curiously makes much of the established Company policy not to release the home addresses of its employees (see Resp.Br., pp. 22, 27). However, the intimation (Resp.Br., p. 27) that the Company refused to supply the list solely because of its established policy without regard to its other legal obligations has no support in the record, in the findings of the trial examiner, or in the findings of the panel of the Board itself. And, in its brief, the Board four times acknowledges that the request was refused on the grounds that neither "law nor contract" obligated the Company to supply the list (Resp.Br., pp. 10-11, 22).

Moreover, contrary to the Board's suggestions (R. Vol. I, p. 33; Resp.Br., pp. 22, 27), we have not argued, and we do not now argue, that an employer could not be required, in a proper case, to furnish a union with employee home addresses if requested in connection with and demonstrated to be relevant and necessary to meaningful

collective bargaining concerning wages, hours and working conditions.⁴ That question, however, is not presented in this case.

In the absence of a statutorily imposed duty to supply information, an employer plainly is not required to do so. And, as pointed out in our opening brief (pp. 16-18), the supplying of such information in the absence of a statutory duty would probably be a violation of section 8(a)(2) of the Act. As the Board acknowledges, such a list would contribute to the strength of the Union. The Board refers to what it characterizes as our "curious construction" of section 8(a)(2) (Resp.Br., p. 27). In turn, we can only refer this Court directly to the language of that section which plainly makes it unlawful for an employer to "contribute financial or other support" to any labor organization (Labor Management Relations Act, 61 Stats. 136, 141, 29 U.S.C. 158(a)(2)). The Board simply misses the point when it asserts that our position would result in the disappearance of "much of the duty imposed by Sections 8(d) and 8(a)(5)" (Resp.Br., p. 27). The point is that, absent a contractual or statutory duty, an employer cannot be required to—and indeed is not permitted to—supply support to a union which will strengthen its position.

⁴The Board's dissenting member (R. Vol. I, p. 39) and the trial examiner (R. Vol. I, pp. 17-18) expressly took note of this position in their opinions.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should set aside the Board's order.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NOBLE K. GREGORY,
Attorney for Petitioner.

IN THE
United States Court of Appeals
For the Ninth Circuit

NO. 21958 ✓

GILBERT J. SHEFFELS AND ELEANOR SHEFFELS,
HUSBAND AND WIFE, APPELLANTS

vs.

UNITED STATES OF AMERICA, APPELLEE

NO. 21958A

MARJORIE HEITMAN, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON NORTHERN
DIVISION

BRIEF FOR THE APPELLANTS

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Argument:	
I. That the expenses incurred by the taxpayer Appellants during the taxable year 1961 in making tours under the auspices of the "People-to-People" program are deductible for Federal Income Tax purposes under the Provisions of Section 170 of the Internal Revenue Code	9

IN THE
UNITED STATES COURT OF APPEALS

for the Ninth Circuit

NO. 21958

Gilbert J. Sheffels and Eleanor Sheffels, Husband and Wife,
Appellants

vs.

United States of America, *Appellee*

NO. 21958A

Marjorie Heitman, *Appellant*

vs.

United States of America, *Appellee*

*On Appeal from the Judgment of the United States District
Court for the Eastern District of Washington
Northern Division*

BRIEF FOR THE APPELLANTS

OPINION BELOW

The District Court's opinion is reported at 264 Fed. Supp. 85. The District Court's Opinion constitutes Findings of Fact and Conclusions of Law.

JURISDICTION

This is a suit for a Refund of Federal Income Taxes, and interest, allegedly over-paid by both Appellants for the taxable year 1961. Both Appellants filed timely claims for refund subsequent to the payment of the tax. In each instance the claims for refund were formally disallowed and timely Complaints were filed in the Federal District Court. Jurisdiction was predicated upon 28 U. S. Code, Section 1346(a).

The cases were consolidated for trial by agreement of the parties (R. 5).

The Opinion of the District Court (264 Fed. Supp. 85) was entered on the 8th day of February, 1967. The Judgments in both cases were entered on March 10, 1967.

The Jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether expenses incurred by the taxpayer Appellants during the taxable year 1961 in making tours under the auspices of the "People to People" program are deductible for Federal Tax purposes under the provisions of Section 170 of the Internal Revenue Code?

STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

[Sec. 170(a)]

(a) ALLOWANCE OF DEDUCTION. —

(1) GENERAL RULE. — There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary or his delegate.

* * * * *

(c) CHARITABLE CONTRIBUTION DEFINED

— For purposes of this section, the term ‘charitable contribution’ means a contribution or gift to or for the use of —

(1) A State, a Territory, a possession of the United States, or any political subdivision, of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.

* * * * *

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STATEMENT

Both Appellants in this proceeding took trips under the auspices of the “People-to-People” program.

Appellant, Marjorie Heitman, is an unmarried woman and a resident of Spokane, Washington. She timely filed her Federal Income Tax for 1961 and paid the tax shown as due thereon. Subsequent to the filing of the return, the Internal Revenue Service made an assessment of additional tax for the year 1961 in the amount of \$597.50, which included interest. The amount was paid on December 4, 1964.

A claim for refund was timely filed. After the refund was rejected, a Complaint was filed in the Federal District Court seeking a refund in the amount paid.

Appellant, Marjorie Heitman, is a medical doctor actively engaged in the practice of medicine in Spokane, Washington. During the year 1961 she expended \$1,895.00 for travel in connection with a tour of the Orient sponsored by the organization known as the Spokane "People-to-People" Council. This amount was deducted as a charitable contribution on her 1961 Federal Income Tax return. The disallowance of the charitable deduction by the Internal Revenue Service resulted in the assessment of additional tax referred to above for the taxable year 1961 (Pre-Trial Order).

Appellants, Gilbert J. Sheffels and Eleanor Sheffels are husband and wife, who filed a joint timely Federal Income Tax return for the taxable year 1961 and paid the tax shown as due thereon. Subsequent to this, the Internal Revenue Service assessed additional tax and interest, which said

amount was paid by the Appellants who then filed a timely claim for refund of such tax.

Appellant Gilbert Sheffels and his brother Robert Sheffels are engaged in the business of farming. In 1961 the Appellants expended \$4,230.94 in making a tour of the Far-East sponsored by the "People-to-People" Council of Spokane, Washington. The Appellants claimed a charitable contribution deduction of \$4,230.94 on their 1961 Federal Income Tax return. This amount was disallowed by the Internal Revenue Service and resulted in the refund claim referred to above (Pre-Trial Order).

The Local Chapter of the "People-to-People" organization in Spokane, Washington, was headed by Dr. Robert Hunter. The organization was set up partially at the request of the United States Information Agency (R. 14). The program itself was the dream of President Eisenhower in 1956 (R. 15, 60, 183) to build a program of communication between Americans and citizens of other lands in establishing lasting two-way relationships from which international friendship and understanding could grow. The technique was to be direct through "People-to-People" as distinguished from official government contacts (Ex. 1). Dr. Hunter's diligence in the "People-to-People" program resulted in his being nominated to act on the National Board of Trustees (Ex. 11).

The Spokane "People-to-People" Chapter has an office located in Spokane, Washington, which is maintained by volunteer employees (R. 15).

Trips are arranged on the local level. A leader is picked and conversations had with individuals who might be interested in the trip (R. 19). Individuals are invited for reasons connected with their work or activities. The group then undergoes an orientation session. They have briefings by experts in the field, meet together, discuss the countries involved and then undertake the trip. Prior to the tour the group is briefed by the government in Washington, D. C., New York City or San Francisco (R. 20).

In order to be chosen for a tour it is mandatory that the individuals subsequent to the trip maintain their membership in the "People-to-People" organization and participate in its activities. The Appellants in this case followed the above procedures (R. 21, 67, 94, 95).

During the trip the individuals meet what is termed counter-parts in the various countries to further the purposes of the "People-to-People" organization. The trips involved in this proceeding were work trips (R. 67, 94, 95).

Appellant, Marjorie Heitman, is a doctor, and she headed a group of nurses who visited counter-parts in hospitals in the various countries which they visited (R. 62, Ex. 13). Appellant, Sheffels, is concerned with agriculture (R. 91) so his particular tour was an agricultural tour with emphasis on what the people in foreign countries were doing (Ex. 17).

The "People-to-People" organization has many functions in the Spokane area other than tours. For example,

they host local foreign college students in their homes at Christmas and Easter vacation times. In addition, they run seminars on Americanism (R. 22, Ex. 8).

The "People-to-People" tours are established by the Local Chapter. The travel agencies who eventually sponsor the tour do not establish the itinerary. The travel agency helps with primary things such as air schedules, transportation and lodging in the various countries visited. Initially, the travel agency participation was by bid (T. 23).

As to counter-part meeting with members in foreign countries, the United States Information Agency does most of the arrangements with regard to the counter-part meetings and briefings (R. 24, T. 56).

Both Appellants spent sums over and above those claimed as deductions on the Federal Income Tax returns for the taxable year 1961 (R. 81, 99).

The Federal District Court disallowed the claims of both Appellants. (See Opinion).

Prior to the trial the Appellee conceded the only other issue involved in the Sheffel's case. (See Judgment).

Appellants believe that the District Court Opinion was in error.

SUMMARY OF ARGUMENT

Appellants herein each spent a sum of money in making a tour under the auspices of the "People-to-People" program. The purpose of the program, as instituted by Dwight Eisenhower, was to foster better relationships between Americans and people of foreign countries through a mutual understanding.

Appellants on their 1961 Federal income tax returns deducted part of the tour expenses as a charitable contribution under Section 170 of the Internal Revenue Code. The Internal Revenue Service disallowed the deductions. The Federal District Court agreed—at least in part—with the Government's position.

Appellants assert herein that the Lower Court was in error since the contributions were made to the United States and therefore deductible under the provisions of Section 170 (c) (1) of the Internal Revenue Code.

The Lower Court construed the language of Section 170 (c) (1) too literally. The facts involved in the instant proceeding bring the contributions within the statute and the decision to the contrary should be reversed.

ARGUMENT

I

THE EXPENSES INCURRED BY THE TAXPAYER APPELLANTS DURING THE TAXABLE YEAR 1961 IN MAKING TOURS UNDER THE AUSPICES OF THE "PEOPLE-TO-PEOPLE" PROGRAM WERE DEDUCTIBLE FOR FEDERAL TAX PURPOSES UNDER THE PROVISIONS OF SECTION 170 OF THE INTERNAL REVENUE CODE.

In these days when comedians refer to the American embassies as being just a "stones throw away" the factual pattern involved in the instant proceeding is indeed refreshing.

In 1956 President Eisenhower started a program entitled "People-to-People". The idea was to extend a hand of friendship from our people to people in foreign countries (R. 60).

Spokane, Washington, was one of the first four chapters started in the United States. The Spokane chapter has performed impressively with its activities and interests in forwarding the ideas initially set forth as objectives by President Eisenhower (R. 197). The "People-to-People" program admittedly has relieved some functions of the State Department (R. 199).

Appellants went on separate "People-to-People" tours under the auspices of the Spokane chapter and upon their return deducted, as a charitable contribution, the amounts which they spent for transportation. In each instance the

Appellants spent amounts in excess of those deducted on their Federal tax returns (R. 81 and 99).

Section 170 of the Internal Revenue Code entitled "Charitable Contributions and Gifts" allows as a deduction any charitable contribution, payment of which is made within the taxable year to certain defined charitable organizations. Subsection (c) (1) of Section 170 allows a deduction to a state, a territory, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.

The District Court, in its Opinion, after reviewing the facts, felt that under the facts in this case the taxpayers were the primary beneficiaries and the purposes of the Government were served only incidentally. In so holding, the District Court judge stated:

"I can see very little difference between the private trips made by the ordinary tourist and those made by the taxpayers here."

Appellants submit that this is erroneous.

The instant case is one of first impression. Appellants submit that the emphasis on the word "exclusively" by the Lower Court is erroneous under the factual pattern set forth herein.

First, the Spokane chapter of the "People-to-People" used a great deal of discretion in picking people for tours. The people who were picked were required to attend meetings prior to the trip and to remain a member of the organization upon their return.

Tour participants were thoroughly briefed locally and by the United States Information Agency prior to their departure. They were told that they would have to work while on the tour and were expected to continue to do so upon their return (R. 67).

While on the tour, exhaustive itineraries were prepared by the United States Information Agency and meetings were arranged with counter-parts throughout the tour. Upon their return the participants were expected to spread the word throughout the community. (R. 75, 98).

Both Appellants in this proceeding following the above schedule. Mr. and Mrs. Sheffels made written reports (R. 156), filed newspaper articles while en route, and made countless speeches upon their return (Ex. 20, R. 98, 155 and 160). Their conduct was certainly in keeping with the overall objective to dispel the "ugly American" image (T. 171).

Dr. Heitman, as the court indicated, was most diligent in an effort to secure information and impart counsel and good will to those whom she met in foreign countries. The District Court Judge felt that ". . . the United States

of America gained materially in stature and good will by her association with doctors and nurses in foreign lands." Upon her return to the United States she made several speeches and at least one trip on behalf of the program (Ex. 22, R. 76).

The term "exclusively for public purposes" as is used in Section 170 (c) (1) should not be strictly adhered to. It is doubtful that any contribution could be made to the United States of America without some entailing benefit to the donor. There seems to be nothing available on what Congress meant in enacting Section 170 (c) (1), but certainly they didn't mean to completely limit contributions which are so publicly beneficial as those concerned in the instant proceeding.

The cases cited in the District Court Opinion do not seem applicable. In *People Ex. rel Lawless v. City of Quincy*, 69 N.E. 2d 892, 395 Ill. 190 (1946), and the *City of Toledo v. Jenkins*, 54 N.E. 2d 656, 143 Ohio St. 141, the "use of property" was involved. This of course is distinguishable from the instant factual situation.

In *Green v. Bookwalter*, 207 F. Supp. 866, 878 (W.D. Mo. 1962), one of the purposes of the commission was to promote a profitable business. Such is not the factual pattern in the instant case.

In *Clark v. C.I.R.*, 158 F.2d 851 (6 Cir. 1946), the Taxpayer had enabled his son to return to his station in mili-

tary service. Again, this case does not apply to the instant factual pattern.

In *Allis-Chalmers Mfg. Co. v. United States*, 200 F. Supp. 91 (E.D. Wis. 1961), the corporation together with other parties had contributed a calculator to a state university with the stipulation that the calculator be made available by the university to the donors for a twenty year period. In denying an immediate deduction for the contribution the court stated as follows:

As used in the statute, the words 'gifts' and 'contributions' contemplate transfers of property without consideration. A reading of the two agreements which we hold to be complementary each to the other, clearly establishes not only the existence of consideration but reveals a painstaking care on the part of all of the parties to the two contracts to provide that the consideration or benefits be distributed in substantial proportion to the contribution made by each individual party. . . . Where as here the benefits received by the Contributing Members are so immediate, tangible and so heavily weighted in their favor, no deduction is allowable under § 23 (q).

In the *Allis-Chalmers Manufacturing Company* case, above, it would appear that the amounts were deductible through depreciation over a period of the twenty years since they were classified as capital expenditures. The case does not seem to control in any way the instant proceeding.

If President Eisenhower himself had personally supervised the Spokane "People-to-People" organization, he couldn't have improved its stature. The Appellants sincerely

made a worthwhile contribution to the United States of America.

If the contributions involved herein are not held to be deductible, the United States has nonetheless been the beneficiary. In recent years there has been an old saying that in most foreign countries today you can always find the United States Embassy by "following the mob".

The Spokane chapter of the "People-to-People", the Appellants, and many like them, are doing what they can to reverse this situation and lighting at least one candle.

The Appellants submit that the District Court interpreted Section 170 (c) (1) too literally and should therefore be reversed.

Respectfully submitted,

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**United States Court of Appeals
For the Ninth Circuit**

RUTH IOLA HOFFMAN, *Appellant*,

vs.

UNITED STATES OF AMERICA, and

PEARL L. LECHNER, *Appellees*.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
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WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, *Judge*

OPENING BRIEF OF APPELLANT

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United States Court of Appeals
For the Ninth Circuit

RUTH IOLA HOFFMAN, *Appellant,*

vs.

UNITED STATES OF AMERICA, and
PEARL L. LECHNER, *Appellees.*

No. 21959

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, *Judge*

OPENING BRIEF OF APPELLANT

I. JURISDICTIONAL STATEMENT

Jurisdiction is conferred pursuant to the National Life insurance Act (63 Stat., 74, 38 U.S.C.A., Sec. 701-784) and diversity of citizenship under 38 U.S.C. No. 784.

II. STATEMENT OF THE CASE

That the appellant, Ruth Iola Hoffman, was married to Franklin A. Hoffman on August 16, 1925 and lived with him thereafter until a divorce was granted on the 7th day of March, 1963, in the Superior Court of the State of Washington for King County, being Cause No. 578937; that at all times they were residents of Seattle, King County, Washington.

That Franklin A. Hoffman, while enlisted in the United States Army in the years 1950 and 1951, obtained two National Service Insurance Policies for \$5,000.00 each, in which the appellant, his wife, was the designated beneficiary.

That in January, 1962, the said Major Franklin A. Hoffman, a resident of Seattle, King County, Washington, filed a suit for divorce against his wife in the said Superior Court for King County, and for a division of the community property belonging to him and his wife.

That in said divorce decree the plaintiff, Franklin A. Hoffman, was ordered and directed by the court to at all times keep in full force and effect the two life insurance policies on his life and to keep and maintain Ruth Iola Hoffman the sole beneficiary in each of said policies during her life time.

That the said Franklin A. Hoffman, in contemptuous violation of said decree of divorce, designated the appellee, Pearl L. Lechner, as beneficiary in said policies.

That the said Franklin A. Hoffman died about April 10, 1964, and thereafter the Veterans Administration denied the claim of Ruth Iola Hoffman to said insurance money but has not as yet paid insurance money to anyone. That the said Ruth Iola Hoffman filed suit in the United States District Court for the Western District of Washington, Northern Division, Cause No. 6408, against the United States of America and Pearl L. Lechner, defendants, stating that she was owner of and entitled to the insurance money by order of the court which had adjudicated her the irrevocable beneficiary in the said policies, and

that Franklin A. Hoffman's right to designate a change of beneficiary in said policies had been judicially taken away from him.

That the United States filed an answer and counterclaim in the nature of an Interpleader, and stands ready to pay the proceeds of said policies in accordance with the decree of the court. That the appellee in the District Court denied the claim of Ruth Iola Hoffman's allegation that she was entitled to the proceeds and claimed the proceeds to be her property.

That a stipulation was entered into between the parties on or about February 28, 1967 in regard to the issues and facts and the matter was submitted to the court upon said stipulation and the motions for a summary judgment which came on for hearing at pretrial and resulted in the court's opinion that the defendant, Pearl L. Lechner, was entitled to the proceeds of both policies.

IV. SPECIFICATION OF ERRORS

THE COURT ERRED:

1) In holding that Pearl L. Lechner was the beneficiary entitled to the proceeds of both policies in the sum of \$10,134.42.

2) In granting the recovery of an attorney fee in the amount of 10% of the total sum to be paid under the two policies to the attorneys for Pearl L. Lechner for their services.

3) In holding that Ruth Iola Hoffman was not entitled to recover said money in the sum of \$10,134.42.

4) In holding that the judgment in favor of Ruth

Iola Hoffman in the Washington Superior Court was not *res judicata* and binding upon Franklin A. Hoffman and his privies, the United States of America and Pearl L. Lechner.

V. STATEMENT OF APPELLANT'S POINTS ON APPEAL

1) That the Superior Court judgment in favor of the appellant, set forth in her complaint, is *res judicata* of all issues existing in the present case in the U.S. District Court.

2) That the defendants, United States of America and Pearl L. Lechner, are in privity with Franklin A. Hoffman, and each of them is bound by the Superior Court judgment, and concluded by the said judgment.

3) That the right to the insurance money was a vested property right and community asset of the appellant and her husband, Franklin A. Hoffman, and disposable as such in the divorce case, Cause No. 578937 in the Superior Court of the State of Washington for King County.

4) That this suit resolves itself into a controversy between the claimants to a fund involving property rights which should be disposed of under the State law rather than the Federal law.

5) That the judgment herein, appealed to the Circuit Court, unlawfully takes away the appellant's constitutional rights granted to the appellant by the Fifth Amendment to the Constitution of the United States of America.

ARGUMENT

The question involved in this appeal is the same as before the District Court: which claimant, the plaintiff, Ruth Iola Hoffman, or the defendant, Pearl L. Lechner, was entitled to recover a judgment against the United States of America for the proceeds of two policies of insurance?

A Stipulation of Facts was filed on May 28, 1967 (Tr. 19), leaving only questions of law for the District Court to decide.

The appellant believes the judgment of the court granting a recovery of \$10,134.42 in favor of the appellee, Pearl L. Lechner, and the recovery of attorneys fees in favor of the appellee attorneys, is erroneous. The judgment of the District Court should have been in favor of the appellant, Ruth Iola Hoffman.

The judgment of the Superior Court of the State of Washington for King County, Cause No. 578937, decided on March 7, 1963, is *res judicata* of all facts, issues and contentions set forth in the first cause of action in said Cause No. 6408 in the United States District Court for the Western District of Washington, Northern Division.

The said Superior Court case was instituted by Franklin A. Hoffman, plaintiff, vs. Ruth Iola Hoffman, defendant, in which suit the plaintiff prayed for a divorce from his wife, and for a division of the property rights belonging to the parties (Plaintiff's Exhibit No. 1-Tr).

The said divorce suit was a contested case and resulted in a judgment by the court and the adjudica-

tion of all property rights; that in the court's Findings of Fact it is stated:

"That the plaintiff and defendant own as community property the following:

United States Government Life Insurance in the amount of \$10,000.00.

National Service Life Insurance in the amount of \$5,000.00,

and further that

"The defendant should be entitled to be the beneficiary to both the said National Service Life Insurance and the said United States Government Life Insurance, the plaintiff to be required to pay all premiums, due or to become due, upon said policies, by having said premiums remitted directly in payment of said premiums by allotment out of said retirement income or directly to Ruth Iola Hoffman, so that the policies shall at all times be kept in good standing."

In the said divorce decree the court awarded to the defendant Ruth Iola Hoffman, the life insurance, to-wit:

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant be awarded as her sole and separate property the following

Policy No. 10981, dated August 1, 1947, in the principal sum of \$5,000.00, in the United Services Life Insurance Company.

Policies Nos. V 16344154, in the sum of \$5,000.00, effective on or about April 17, 1951, and No. V 14236542, in the sum of \$5,000.00, effective about April 1, 1950; each of said policies being in the National Service Life Insurance Company,

including any renewals, extensions or conversions thereof, if any; and the said plaintiff is further

ordered and directed to at all times designate, keep and maintain Ruth Iola Hoffman as the sole beneficiary in each of said policies during her lifetime; and plaintiff is further ordered to pay the premiums on the said policies as they become due, by having said premiums paid directly by remittance out of his said retirement income, or remitted directly out of said income to Ruth Iola Hoffman; provided, however, in the event that the premiums cannot be paid directly out of said income plaintiff shall pay the money direct to Ruth Iola Hoffman so that she can pay the premiums.”

“It is further stipulated that the plaintiff in the divorce action, Franklin A. Hoffman, was ordered by the court and directed to at all times keep in full force and effect Policies No. V 16344154 for the sum of \$5,000.00, and V 14236542 for the sum of \$5,000.00. He was further ordered and directed to designate and keep the defendant in the divorce action, Ruth Iola Hoffman, as the sole beneficiary of each of the policies during her lifetime.” (Tr. 19)

We claim that the Superior Court had jurisdiction of the plaintiff, Franklin A. Hoffman and the defendant, Ruth Iola Hoffman, and all of their property rights, community and separate, and that the judgment in the divorce action determined said property rights, which judgment was final and binding upon the parties to said suit, including their privies.

In support of said statement, we cite the code and the following cases:

R.C.W. 26.08.110

Lynch v. Lynch, 67 Wn (2d 84 (1965)

Morris v. Morris, 69 Wash. Dec. (2d) 508 (1966)

Loomis v. Loomis, 47 Wn. (2d) 468 (1955)

Smith v. Smith, 63 Wash. 288 (1911)

Sears v. Rusden, 39 Wn. (2d) 412 (1951)

McLaughlin v. McLaughlin, 43 Wn. (2d) 111 (1953)

United Mtg. Co. v. Price, 46 Wn.(2d) 587 (1955)

“RCW 26.08.110. Decree of divorce or annulment — Finality — Restraining orders. In all cases where the court shall grant a divorce or annulment, it shall be for cause distinctly stated in the complaint, proved, and found by the court. Upon the conclusion of a divorce or annulment trial, the court must make and enter findings of facts and conclusions of law. If the court determines that either party, or both, is entitled to a divorce or annulment, judgment shall be entered accordingly, granting the party in whose favor the court decides a decree of full and complete divorce or annulment, and making such disposition of the property of the parties, either community or separate, as shall appear just and equitable, having regard to the respective merits of the parties, to the condition in which they will be left by such divorce or annulment, to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for costs, and for the custody, support and education of the minor children of such marriage. Such decree as to alimony and the care, custody, support and education of the minor children of such marriage. Such decree as to alimony and the care, custody, support and education of the children may be modified, altered and revised by the court from time to time as circumstances may require. Such decree, however, as to the dissolution of the marital relation and to the *custody, management and division of the property* shall be final and conclusive as in civil cases, and provided that the trial court shall at all times, including the pendency of any appeal, have the power to grant any and all restraining orders that may be necessary to protect the parties and secure justice.” (Italics

ours)

The case of *United etc. Co. v. Price, supra*, was a contest between the assured's estate and the named beneficiary (the divorced wife), each claiming the proceeds. Prior to this action a divorce decree granted all insurance policies to the husband in the disposition of the property rights.

"The administrator of the insured's estate is entitled to the proceeds of the insurance policy under such a decree."

"Such a decree is more than an agreement of the parties — it becomes the superior court's disposition of the property of the parties properly before it. Unless that be so, the superior court failed to carry out the mandate of our statute to make ' . . . such disposition of the property of the parties . . . as shall appear just and equitable' RCW 28.08.110."

"The interest of the beneficiary in the proceeds of an insurance policy belonging to the community (however the beneficiary's right may be defined) *is an asset* in which the community has a very real interest. This is indicated by a long line of cases, beginning with *Occidental Life Ins. Co. v. Powers* (1937) 192 Wash. 475, 74 P.(2d) 27, 114 A.L.R.531, restricting the right of the husband, as manager of the community, to make anyone except his wife or his estate the beneficiary of such a policy."

In *McLaughlin v. McLaughlin, supra*, a divorce decree was entered. After the judgment became final the husband filed a motion to reconsider. The superior court entered a supplemental decree affecting the home. On appeal, the Supreme Court cites the divorce code RCW 26.08.110, and in reversing the lower court states:

“The decree cannot be modified, since, by the express terms of the statute, the award as to the custody, management, and division of property is final and conclusive, subject only to the right of appeal. The trial court has no power or jurisdiction to modify it in that respect.”

The appellees, Pearl L. Lechner and the United States of America are each in privity with Franklin A. Hoffman and each is concluded by the divorce judgment. We cite the following law and cases in support of said statement:

Bankin v. Livers, 181 Wash. 370, 43 P.(2d) 42
Ruffner v. Scott, 46 Wn. (2d) 240
Symington v. Hudson, 40 Wn. (2d) 331
Reed v. Allen, 286 U.S. 191
Ma Chuck Moon v. Dulles, 237 F.2d 241, 152 U.S. 1002
Riblet v. Ideal Cement Co. 54 Wn. (2d) 779

The law is clearly set forth in a quotation from *Sears v. Rusden*, 39 Wn. (2d) 412:

“In *Baskin v. Livers*, 181 Wash. 370, 43 F.(2d) 42, this court adopted the following rule:

‘A judgment rendered by a court having jurisdiction of the parties and the subject matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment, in respect to its validity, verity, or binding effect, by parties or privies, in any collateral action or proceeding, except for fraud *in its procurement*’ (Italics ours)

and the quotation from *Reed v. Allen*, *supra*, decided by the Supreme Court of the United States:

“These decisions constitute applications of the general and well settled rule that a judgment, not set aside on appeal or otherwise, is equally ef-

fective as an estoppel upon the points decided, whether the decision be right or wrong. *Cornett v. Williams*, 20 Wall 226, 249, 250; 22 L.ed. 254 258, 259; *Wilson v. Dean*, 121 U.S. 525, 534; 30 L.ed. 980."

"The indulgence of a contrary view would result in creating elements of uncertainty and confusion and, in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert. Judgment reversed."

We quote further from *First National Bank v. United States F & G Co.*, 35 S.E. 2d 47, 162 A.L.R. 1003 (Conn 1945). Two different actions were involved. In the second action *res judicata* was pleaded. It was a bar. The court states the rule of *res judicata*:

"Decisions of our Supreme Court already set forth the essentials of *res judicata*. In the very recent case of *Bagwell v. Hinton*, 205 S.C. 377, 32 S.E. 2d. 147, 156, it was said: 'Before the defense of *res judicata* is made good the following elements must be shown: (1) The parties must be the same or their privies; (2) The subject matter must be the same; and (3) while generally the precise point must be ruled, yet where the parties are the same or are in privity the judgment is an absolute bar not only of what was decided but of what might have been decided.'

"Privies are those who are so connected with the parties in estate, or in blood, or in law, as to be identified with them in interest, and consequently to be affected with them by litigation."

Under the laws of the State of Washington government life insurance policies, Veterans pensions and retirement pay are community assets and disposable as such in divorce actions. It has been so adjudicated in the following cases:

Loomis v. Loomis, 47 Wn.(2d) 468

Morris v. Morris, 69 Wash. Dec.2nd 508

At all times we claim that the two insurance policies involved herein are a property right belonging to Franklin A. Hoffman and Ruth Iola Hoffman, his wife, and that all right and title to said policies were involuntarily conveyed and set over to Ruth Iola Hoffman in the division of the property rights between the parties. Such is the Restatement of the Law, 1942:

“Sec. 110. Judgment as a transfer of title. *In an action involving any property interest, where a court which has jurisdiction over the property interest renders a judgment which determines that one of the parties has a right or title superior to that of the other party, the judgment has the effect of an involuntary transfer from the unsuccessful party to the other.*” (Italics ours)

In support of appellant's Point 5 (Tr. 58) that the judgment herein unlawfully takes away the appellant's constitutional rights granted by the Fifth Amendment to the Constitution of the United States, we cite the following authorities:

Lynch v. United States, 78 L.ed. 1434; 54 S.Ct. 840

Union Pacific R.R. Co. v. United States, 99 U.S. 700; 25 L.ed. 496

Hodges v. Snyder, 43 S.Ct. 435; 67 L.ed. 819

In the case of *Lynch v. United States*, *supra*, two veterans actions brought on war risk term insurance policies were dismissed in the District Court. Writs of Certiorari to the Supreme Court were taken, resulting in a reversal of the lower court. Congress repealed

the insurance rights in the following language quoted from said decision:

“All laws granting or pertaining to yearly renewable term insurance.

This repeal, if valid, abrogated outstanding contracts, and relieved the United States from all liability on the contracts, without making compensation to the beneficiaries.”

“Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.”

“When the United States enters into contract relations its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”

“Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress.”

“On the other hand, WarRisk policies, being contracts, are property and create vested property rights.”

In the case of *Union Pacific R.R. Co. v. United States*, *supra*, the court states:

“The United States cannot, any more than a state, interfere with private rights, except for legitimate governmental purposes. But, equally with the states, they are prohibited from depriving persons or corporations of property without due process of law.”

Hodges v. Snyder, 43 S.Ct. 435; 67 L.ed 819, holds:

“Private rights of parties, which have been vested by the judgment of a court, cannot be taken away by subsequent legislation, but must

thereafter be enforced.”

How can Lechner and the United States of America claim that Hoffman had a right to change the beneficiary when the right was judicially taken away from him? He had left no legal or moral right to attempt to change the beneficiary. The United States of America is endeavoring to help enforce a wrong in favor of Lechner and against the appellant.

We submit that the judgment of the District Court should be reversed and the judgment be entered in favor of the appellant.

Respectfully submitted,

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and

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CERTIFICATE OF COUNSEL

I certify that in connection with this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with the rules.

RODMAN B. MILLER

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHECKER VAN & STORAGE OF OAKLAND, INC.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

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FILED

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WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21,961

CHECKER VAN & STORAGE OF OAKLAND, INC.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

This action was brought by Checker Van & Storage of Oakland, Inc. (hereinafter "Checker"), appellant herein, for a declaratory judgment against the United States (R. 1). 1/ The complaint sought a declaration that Checker was not liable to the United States for an amount in excess of \$10,000 which the United States asserted was due under a contract between the parties (R. 1-3).

L/ "R" citations are to the Transcript of Record prepared by
the clerk.

The complaint alleged that the district court had jurisdiction over this suit against the United States under the Declaratory Judgment Act, 28 U.S.C. 2201-2202; Section 10 of The Administrative Procedure Act, 5 U.S.C. (Supp. II) 701-704; The Wunderlich Act, 41 U.S.C. 321, 322; 28 U.S.C. 1331; and Rule 57, Federal Rules of Civil Procedure (R. 1). In resisting the motion of the United States to dismiss the complaint for lack of jurisdiction (R. 41), Checker also asserted jurisdiction for this claim in excess of \$10,000 under the Tucker Act, 28 U.S.C. 1346(a)(2) (R. 48).

The district court granted the motion of the United States to dismiss (R. 57), holding that there existed no basis of jurisdiction over this suit against the United States (R. 55-56).

Checker filed a timely notice of appeal (R. 58). The jurisdiction of this Court is invoked under 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE

Checker, a public warehouse company, entered into contracts with the United States for the storage of goods of military personnel at approved warehouses at 608 Franklin Street, and 325 Grove Street, Oakland, California (R. 2, 8, 28). On or about March 2, 1964, goods held by Checker under those contracts were damaged by a fire while stored in a warehouse at 12th and Pine Streets, Oakland, California, an area which had not been approved for storage. (R. 29) Thereafter, the Contracting Officer made a determination under the "disputes" clause of the contracts that Checker was liable for the damage in an amount in excess of \$10,000 (R. 2).

That decision was appealed by Checker to the Armed Services Board of Contract Appeals (the ASBCA) (R. 2). After a hearing on the merits (R. 27), the ASBCA, in two decisions, determined that Checker was liable under its contract, on the basis of the facts shown, as a result of its storage of goods in an unauthorized location (R. 27-49). Those decisions did not deal with the amount of the damages, however (R. 27) and that question remained pending before the ASBCA. We are advised that, at the time of this writing, the ASBCA has not yet determined the damages for which Checker is liable.

On October 4, 1966, Checker brought this action, alleging in its complaint that the United States asserted, in accordance with the decision of the ASBCA, that Checker was liable for the loss of the goods and had threatened to cancel Checker's contracts with the United States if payment were not made (R. 2-3). It did not assert that payment of any specified amount had been demanded or that any threats to cancel contracts before a final determination of the amount due had been made. 2/

The relief prayed for was a declaration that Checker was not liable for the amount, in excess of \$10,000, which the United

2/ Indeed, we are advised by the Department of the Army that, by letter of 7 April 1966 from John B. Hook, Esquire, counsel for Checker's insurance carrier, Checker entered into a deferment agreement by which it agreed to pay whatever amounts were found by ASBCA to be due. In turn the Army, by letter of 20 April 1966, agreed to defer collection until the ASBCA decision and not to place Checker on the List of Contractors Indebted To The United States. If Checker desires, we shall be pleased to furnish this correspondence to the Court to supplement the record.

States asserted was due under its contract (R. 3). Jurisdiction, at various times, was asserted for this suit against the United States under The Declaratory Judgment Act, 28 U.S.C. 2201-2202 (R. 1); Section 10 of The Administrative Procedure Act, 5 U.S.C. (Supp. II) 701-704 (R. 1); The Wunderlich Act, 41 U.S.C. 321, 322 (R. 1); Rule 57, F.R. Civ. P. (R. 1); 28 U.S.C. 1331 (R. 1); and the Tucker Act, 28 U.S.C. 1346(a)(2) (R. 48).

The United States moved to dismiss the action on the ground that it was an unconsented suit against the United States, which the court had no jurisdiction to entertain (R. 41). The district court granted that motion, pointing out that none of the bases of jurisdiction asserted by Checker granted consent to this suit (R. 54-56), and entered judgment dismissing the action (R. 57). From that order, Checker has prosecuted this appeal.

STATUTES INVOLVED

The Tucker Act, 28 U.S.C. 1346(a)(2), provides:

§ 1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: * * *.

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Declaratory Judgment Act, 28 U.S.C. 2201, 2202, provides:

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Section 10 of The Administrative Procedure Act, now recodified as 5 U.S.C. (Supp. II) 702-704, provides in relevant part:

§ 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

§ 703. Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. * * *.

ARGUMENT

Summary

This action seeks, in effect, to restrain the United States from collection of a debt owed to it by Checker; either by forcing the Government to pay Checker the money it would otherwise withhold after the amount of liability is ascertained, or by prohibiting it from adding Checker's name to the List of Contractors Indebted to the United States. We demonstrate herein that this is plainly an unconsented suit against the United States, which cannot be maintained. We show further that Checker, in this suit, is seeking to bypass the plain, simple, and adequate remedy which has been provided by Congress. That remedy, designed by Congress to protect the Treasury from the delays possible from the dilatory prosecution of suits of this sort, is the payment by Checker of the money ultimately found by the ASBCA to be due, and suit in the Court of Claims. Thus, the district court correctly held that it had no jurisdiction to maintain this action.

THIS IS AN UNCONSENTED SUIT AGAINST THE
UNITED STATES WHICH WAS PROPERLY DIS-
MISSED FOR LACK OF JURISDICTION.

By this suit, Checker seeks to prevent the United States from proceeding to collect Checker's indebtedness to it once the precise amount of the debt has been determined by the ASBCA. We show herein that Checker's dissatisfaction with the traditional method of review 3/ does not create jurisdiction in the district court to entertain this action. Rather, Checker, like every other person seeking to extract funds from the common weal by depleting the Treasury, must allow the United States to withhold the amounts found to be due or voluntarily pay them, and seek their recovery in the Congressionally authorized manner - by suit in the Court of Claims. 4/ All of Checker's objections to the determination of the ASBCA may be raised in that suit.

As a background for the examination of this case, of course, "we may lay the postulate that without specific statutory consent, no suit may be brought against the United States." United States v. Shaw, 309 U.S. 495, 500. See also United States v. Sherwood, 312 U.S. 584; Mine Safety Corporation v. Forrestal, 326 U.S. 371; Hawaii v. Gordon, 373 U.S. 57; Balistrieri v. United States, 303 F. 2d 617, 619, (C.A. 7). In the circumstances, it is plain that the United States has never consented

3/ The method of review already agreed to by its insurance carrier.

4/ Or, if there is not enough money yet available due on the Contract to allow the Government to withhold to recover the monies due, it may be necessary for the United States to bring suit against Checker for the money due. All Checker's objections may be raised in defense of such a suit. 41 U.S.C. 321, 322.

to have a suit of this nature, which seeks to prevent it from collecting a debt which has been found to be due it from plaintiff, maintained in its courts. We now examine each of the alleged sources of jurisdiction for this action proposed by Checker, and demonstrate that none of them constitutes a consent to this suit.

1. The Declaratory Judgment Act plainly is not a consent by the United States to suit. For, as this Court has pointed out, that act does not create new jurisdiction in the Federal district courts, but merely adds an additional remedy in those cases where a district court already has jurisdiction. Wells v. United States, 280 F. 2d 275 (C.A. 9). By the passage of that Act, Congress "enlarged the range of remedies available in the federal courts, but did not extend their jurisdiction." Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 671. See also Schilling v. Rogers, 363 U.S. 666, at 677, where the court stated:

[T]he Declaratory Judgment Act is not an independent source of federal jurisdiction. * * *. The availability of such relief presupposes the existence of a judicially remediable right. No such right exists here.

This Court has regularly recognized that the Declaratory Judgment Act does not operate as a consent by the United States to suit, United States v. Preston, 352 F. 2d 352 (C.A. 9); State of Nevada v. United States, 279 F. 2d 699 (C.A. 9); Wells v. United States, 280 F. 2d 275 (C.A. 9), and that is, of course, the general rule. E.g. Clay v. United States, 210 F. 2d 686, 93 U.S. App. D.C. 119 (C.A.D.C.), certiorari denied, 347 U.S.

27; Blanc v. United States, 244 F. 2d 708 (C.A. 2), certiorari denied, 355 U.S. 874; Anderson v. United States, 229 F. 2d 675 (C.A. 5); Lynn v. United States, 110 F. 2d 586, (C.A. 5). Malistriieri v. United States, 303 F. 2d 617 (C.A. 7); Chournos v. United States, 335 F. 2d 918 (C.A. 10).

2. Nor does the Tucker Act, 28 U.S.C. 1346(a)(2), operate as a consent by the United States to this suit in the district court. The Tucker Act, of course, allows suit on a contract claim by a plaintiff to recover funds in the hands of the Government. But that Act allows suit only after the money involved is in the Treasury, thus insuring that suits of this nature will not, through dilatory prosecution, keep funds otherwise due the Treasury for the common good in private hands for unconscionably long periods of time. For a suit of this nature is, in actuality, an attempt to restrain the Government from acting to collect a debt which has been determined to be due and owing. And such a suit is not proper under the Tucker Act. United States v. Jones, 31 U.S. 1; Wells v. United States, 280 F. 2d 275 (C.A. 9); Blanc v. United States, 244 F. 2d 708 (C.A. 2); certiorari denied, 355 U.S. 874; Lynn v. United States, 110 F. 2d 586 (C.A. 5). See also 6A Moore, Federal Practice ¶57.21[1].

But even if the Tucker Act allowed suit for declaratory relief against the United States, which it does not, this action would have to fail, for the complaint expressly alleges that the amount in question is in excess of \$10,000.00 (R. 1). The Act itself only allows suit in the district courts for any "civil action or claim against the United States, not exceeding \$10,000

in amount" 28 U.S.C. 1346(a)(2). Since this action involves a civil action or claim exceeding \$10,000 in amount, it could only be brought in the Court of Claims in any event. Cf. Barnes v. United States, 241 F. 2d 252 (C.A. 9); United States v. Tacoma Oriental S.S. Co., 86 F. 2d 363 (C.A. 9).

3. Section 10 of The Administrative Procedure Act does not grant the district court jurisdiction to entertain this suit either. For that Act allows review only in courts "of competent jurisdiction" 5 U.S.C. (Supp. II) 703. It is quite clear that that Act may not "be deemed an implied waiver of all governmental immunity from suit", Blackmar v. Guerre, 342 U.S. 512, 516.

As stated by the Second Circuit:

The purpose of § 10 is to define the procedure and manner of judicial review of agency action, rather than to confer jurisdiction upon the courts. Moreover, § 10(c) of the Act itself excepts from review under the section agency action for which there is some "other adequate remedy in any court." Suit under the Tucker Act in the Court of Claims provides an adequate remedy for appellant and precludes his reliance on § 10.

Ove Gustavsson Contracting Co. v. Floete, 278 F. 2d 912, 914 certiorari denied, 364 U.S. 894. See also Aktiebolaget Bofors v. United States, 194 F. 2d 145, 90 U.S. App. D.C. 92 (C.A.D.C. Kansas City Power & Light Co. v. McKay, 225 F. 2d 924, 96 U.S. App. D. C. 273 (C.A.D.C.), certiorari denied, 350 U.S. 884; Commonwealth of Massachusetts v. Connor, 248 F. Supp. 656 (D. Mass.), affirmed on opinion of district court, 366 F. 2d 778 (C.A. 1); Chournos v. United States, 335 F. 2d 918 (C.A. 10);

Cotter Corp. v. Seaborg, 370 F. 2d 686 (C.A. 10).

Consequently, it is plain that the United States has never consented to be sued in this type of action. 5/

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

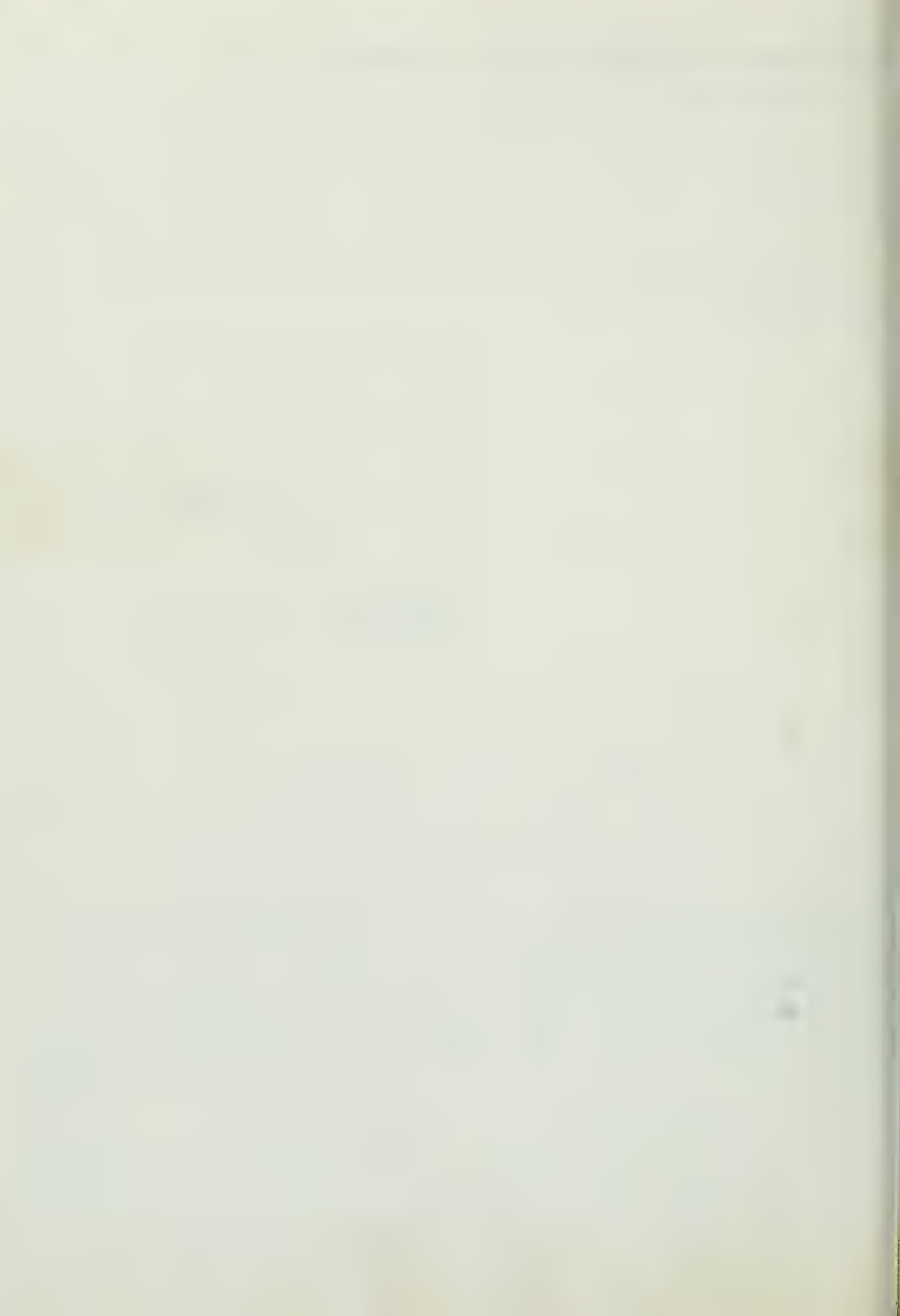
Respectfully submitted,

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

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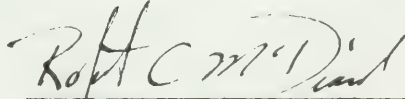
ALAN S. ROSENTHAL,
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5/ Plainly 28 U.S.C. 1331 and Rule 57, F.R. Civ. P., the only remaining grounds for jurisdiction asserted, do not confer jurisdiction over this suit. Indeed, the assertion has apparently been abandoned in this Court. The Wunderlich Act, 41 U.S.C. 321, 322, merely specifies the challenges to the determination of the ASBCA which Checker can raise in its Court of Claims action or by defense to an action by the Government.



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



ROBERT C. McDIARMID,
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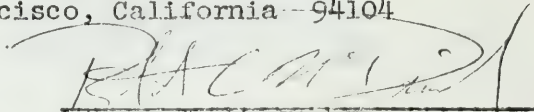
AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } SS.

ROBERT C. McDIARMID, being duly sworn, deposes and says:

That on January 16, 1968, he caused three copies of the foregoing Brief for the Appellee to be served by air mail, postage prepaid, upon counsel for appellant:

Long & Levit
465 California Street
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ROBERT C. McDIARMID.
Attorney for Appellee,
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Subscribed and Sworn to before me
this 16th day of January, 1968.
[Seal]


NOTARY PUBLIC

My Commission expires April 14, 1972.

